Supreme Court, U. S.
FILED
FEB 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1314

1776 K STREET ASSOCIATES, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

WHAYNE S. QUIN
1666 K Street, N.W.
Suite 600
Washington, D.C. 20006

Attorney for Petitioners

Of Counsel:

MAUREEN DWYER STEWART
WILKES & ARTIS,
CHARTERED
1666 K Street, N.W.
Suite 600
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

CONTENTS

	Page
Preliminary Statement	1
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	22
Appendices	1a

CITATIONS

CASES: Page

Ackerman v. *United States*, 340 U.S. 193 (1950).. 10
Algonac Manufacturing Co. v. *United States*, 198 Ct. Cl. 258, 458 F.2d 1373 (1972) 8
Amsden v. *United States*, 146 Ct. Cl. 809, 175 F.Supp. (1959) 9
Brooks v. *Brooks*, XXVIII Washington Law Rptr. 335 (D.C. Sup. Ct. 1900) 8, 12, 20
Brant v. *Virginia Coal & I. Co.*, 93 U.S. 326 (1876) 13
Carney v. *United States*, 462 F.2d 1142, 199 Ct. Cl. 160 (1972) 8
Carr v. *District of Columbia*, 371 F.Supp. 293 (D.D.C. 1974), *aff'd. without opinion*, 521 F.2d 324 (D.C. Cir. 1975), *modified*, 177 U.S. App. D.C. 432, 543 F.2d 917 (1976) 8, 15
Carr v. *District of Columbia*, C.A. 77-445, (D.D.C. December 22, 1977) 14
Carr v. *District of Columbia*, C.A. 77-445, (D.D.C. January 12, 1979).....6, 8, 14, 15, 19
Chesapeake & Potomac Telephone Co. v. *District of Columbia, et al.*, C.A. 2671-75 (consolidated March 28, 1978), 106 Washington Law Reporter 1065 (June 13, 1978) 6, 8-9, 18
Chicago & N.W. Ry. Co. v. *Davenport, et al.*, 95 F.Supp. 469 (D.C. Iowa 1951) 17
Crary v. *Dye*, 280 U.S. 515 (1980) 12
Crosley Corporation v. *United States*, 229 F.2d 376 (D.C. Cir. 1956) 13
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1932) 7, 9, 21
Fitzhugh v. *United States*, 59 App. D.C. 285, 40 F.2d 797 (1930) 4, 12, 21
Hanna v. *Plumer*, 380 U.S. 460 (1965) 11
Hyjack v. *Nolan*, 366 A.2d 715 (N.J. Super. Ct. 1976) 17
In re Cremida's Estate, 14 FRD 15 (Alaska 1953) 17
Klapprott v. *United States*, 335 U.S. 601 (1949).. 10

CITATIONS—Continued

Page

Love v. *United States*, 122 Ct. Cl. 144, 104 F.Supp. 102 (1952) 8
Morris v. *United States*, 174 U.S. 196 (1898) .4, 16, 20, 21
Oklahoma v. *Texas*, 268 U.S. 252 (1925) 13
Parker v. *Sager*, 85 U.S. App. D.C. 4, 174 F.2d 657 (1949) 12, 13
Peoples Bank v. *Eccles*, 161 F.2d 636 (D.C. Cir. 1947) *rev'd. on other grounds*, 333 U.S. 426 (1948) 13
Pierce v. *Cook*, 518 F.2d 720 (10th Cir. 1975)..... 10, 17
Polites v. *United States*, 364 U.S. 426 (1960)..... 8, 10
Potomac Steamboat Co. v. *Upper Potomac Steamboat Co.*, 109 U.S. 672 (1884) 21
Pratt v. *Law*, 13 U.S. (9 Cranch) 453 (1815)..... 4, 20
Puget Sound Alumni of Kappa Sigma v. *City of Seattle*, 422 F.2d 799 (Wash. 1967) 13, 16
Radock v. *Norwegian America Line Agency, Inc.*, 318 F.2d 538 (2nd Cir. 1963) 17
1776 K Street Associates v. *District of Columbia*, C.A. 2015-70 (Order and Judgment, April 6, 1973) 13
Stoner v. *New York Life Insurance Co.*, 311 U.S. 464 (1940) 21
Tarkington v. *U.S. Lines Co.*, 222 F.2d 358 (2nd Cir. 1955) 9
Tozer v. *Charles A. Milling Co.*, 189 F.2d 242 (3rd Cir. 1951) 17
Tsakonites v. *Trans Pacific Carriers Corporation*, 322 F.Supp. 722 (S.D.N.Y. 1970) *cert. denied*, 386 U.S. 1007 (1967) 10
United States v. *Groen*, 72 F.Supp. 713 (D.D.C. 1947) 4
United States v. *Yazell*, 382 U.S. 341 (1966) 21
Van Ness v. *City of Washington*, 29 U.S. (4 Pet.) 323 (1930) 4, 21
Washington Medical Center, Inc. v. *United States*, 211 Ct. Cl. 145, 545 F.2d 116 (1976).....5, 15, 19

CITATIONS—Continued

	Page
STATUTES:	
D.C. Code (1973), as amended:	
Section 7-302	15, 19
1 Stat. 139, Chapter 28 (as amended 1 Stat. 214, Chapter 17); D.C. Code page XXXIII (1973), (as amended D.C. Code page XXXIV [1973])	3
RULES:	
Court of Claims Rule 152(b)	8
Federal Rules of Civil Procedure 60(b)	8, 10, 11
60(b)6	10
TREATISES:	
16A Am.Jur.2d, *Constitutional Law* § 585 (1979)	16
16A C.J.S. *Constitutional Law* § 599 (1959)	16
MISCELLANEOUS:	
B. Cardozo, *The Nature of the Judicial Process*, 33, 112 (1921)	11
Opinion of Hugh T. Taggart, Assistant United States Attorney for the District of Columbia (April 30, 1888)	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. ———

1776 K STREET ASSOCIATES, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PRELIMINARY STATEMENT

Petitioners 1776 K Street Associates, Metropolitan Club of the City of Washington, D. F. Antonelli, Jr., and Washington Medical Center, Inc., pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered on July 18, 1979.

OPINION BELOW

The opinion of the Court of Claims, reported at 602 F.2d 354, is attached hereto as Appendix A (App. 1a). The Order of the Court of Claims denying petitioners' motion for reconsideration is attached hereto as Appendix B (App. 8a).

JURISDICTION

The judgment of the Court of Claims was entered on July 18, 1979. A timely Motion for Reconsideration, Rehearing or, in the Alternative, Suggestion for Rehearing *En Banc*, was denied on September 28, 1979. By Order dated December 14, 1979, the Chief Justice extended the time within which to file this petition to and including February 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1)

QUESTIONS PRESENTED

The questions presented are:

1. Whether the Court of Claims was incorrect in holding that an independent action for relief from a judgment due to a change in law is not available under circumstances where the Court's judgment was based on an interpretation of building regulations issued by President George Washington relating to the original City of Washington, which interpretation was rejected by both local federal and state courts.

2. Whether the Court of Claims should have deferred to the substantive decisions of the local and federal courts within the District of Columbia on the question of ownership of original alleys within the Federal City of Washington based on the construction of building regulations issued by President George Washington.

3. Whether the Court of Claims was in error in granting respondent's motion to dismiss on the basis of "equity" determinations when no factual basis for such determinations was contained in either the complaint or the record and no evidentiary proceedings were permitted.

4. Whether refusal of Court of Claims to set aside their erroneous decision requiring property owners to

pay for land they already owned upon termination of public alley use constituted a taking of petitioners' property in violation of the Fifth Amendment to the Constitution.

STATUTES INVOLVED

The statutes involved are the Act of Congress adopted July 16, 1790 (1 Stat. 139, Chapter 28), District of Columbia Code, (1973), page XXXIII, as amended by Act of Congress approved March 3, 1791 (1 Stat. 214, Chapter 17), District of Columbia Code, (1973), page XXXIV, from which the United States derived the authority to negotiate for the acceptance of the land for the original City of Washington.

STATEMENT OF THE CASE

In 1788, the State of Maryland authorized the cession of land to the Congress of the United States for the Nation's Capital which today is referred to as the "original city" within the District of Columbia. In 1790, Congress accepted the cession and authorized the President to appoint three commissioners to determine the boundaries of the City and to purchase or accept the ceded land from its various owners, primarily nineteen individuals commonly referred to as the "original proprietors."

In 1791, the original proprietors executed identical deeds of trust to trustees designated by the President, conveying to them, in trust, all of the land within the bounds of the original city. The trusts operated to divide the land into three categories: (1) streets, as directed by the President, to be titled in the United States at no charge; (2) public appropriations (for example, Farragut Square), as directed by the President, also to be titled in the United States, which were purchased by the commissioners for 25 pounds per acre; and (3) the entire residue

of the land (the "residue"), which was to be equally divided, one-half to be assigned by the commissioners back to the original proprietors and the other one-half retained by the commissioners for sale to individal purchasers.[1] The Deeds of Trust also authorized President Washington to issue regulations affecting the manner of construction in the Federal City.

Petitioners are the owners of various lots abutting portions of original alleys laid out from the residue portion of the land assigned under the deeds of trust. Each of the petitioners filed applications with the appropriate District of Columbia officials to close portions of the abutting original alleys in order that they might construct improvements on their property. Although the closings were deemed appropriate, on the assumption that the alley land was titled in the United States, the District of Columbia required that each petitioner pay to the Treasury of the United States the assessed fair market value of the portion of the closed alley abutting each petitioner's property.

Subsequently, contrary to the previous advice of the Office of the District of Columbia Surveyor and Corporation Counsel, petitioners found evidence in the National Archives which indicated that the alley land had not been owned by the United States but rather, in accordance with common law, was titled in the abutting property owners.

To recover the money paid by them to the United States Treasury for the closing of the alley portions, petitioners,

[1] More complete discussions of this aspect of the early history of Washington may be found in *Morris* v. *United States*, 174 U.S. 196, 245-259 (1898); *Van Ness* v. *City of Washington*, 29 U.S. (4 Pet.) 232 (1830); *Pratt* v. *Law*, 13 U.S. (9 Cranch) 456 (1815); *Fitzhugh* v. *United States*, 59 App. D.C. 285, 40 F.2d 797, 798-799 (D.C. Cir. 1930); and *United States* v. *Groen*, 72 F.Supp. 713 (D.D.C. 1947); *Brooks* v. *Brooks*, XXVIII Wash. L. Rptr. 335 (May 8, 1900).

in previous proceedings, brought suit against respondent United States in the United States Court of Claims. Petitioners' cases were consolidated for purposes of briefing and arguing Motions for Summary Judgment filed by all parties, and were disposed of by an opinion of the Court of Claims in *Washington Medical Center, Inc.* v. *United States*, 211 Ct. Cl. 145, 545 F.2d 116, decided October 20, 1976. (Attached hereto as Appendix E, App. 61a.)

In that ruling, the Court of Claims denied the petitioners' motion for summary judgment based on its construction of President Washington's regulations, granted the respondent's motion for summary judgment and dismissed the petitions. Although respondent never asserted that title to the alleys was in the United States, and in fact relied solely upon the defense of estoppel and the argument that fair market charges could be made regardless of the title question, the Court of Claims ruled that the charges were proper since it found that title to the alleyways had been in the United States. By Order entered January 7, 1977, the Court of Claims denied petitioners' Motion for Reconsideration, Rehearing, or in the Alternative, Suggestion for Rehearing *En Banc*, and by Order entered May 20, 1977, 211 Ct. Cl. 379, it denied petitioners' Motion for Relief from Judgment and Remand to Trial Judge for Trial on Issue of Title to Alleyways.

On June 6, 1977 petitioners filed a timely Petition for Writ of Certiorari (No. 76-1719) seeking review of the Court of Claims holding that the United States has title to the original alleys in question and its determination that the common law does not apply to interpretation of the deeds of trust or the establishment of the alleys. The petition was denied by order of the Court entered on October 17, 1977, 434 U.S. 902 (1977). On April 10,

1978, petitioners filed a Petition for Rehearing[2] on the basis that the Court of Claims decision was in direct conflict with the intervening decision of the Superior Court of the District of Columbia (Judge John Garrett Penn) in *Chesapeake & Potomac Telephone Co.* v. *District of Columbia, et al.*, Civil Action No. 2671-75 (consolidated), entered on March 28, 1978, (attached hereto as Appendix C, App. 10a) holding that fee title to the original alleys in the Federal City of Washington does not lie in the United States. This petition was denied by order of the court entered on May 1, 1978, 435 U.S. 1018 (1978).

Subsequent to this Court's denial of the Petition for Rehearing, the United States District Court for the District of Columbia (Judge Thomas A. Flannery) in the case of *Oliver T. Carr, Jr.* v. *District of Columbia*, C.A. No. 77-445, having the full benefit of the Court of Claims' October 20, 1976 decision and the Superior Court's March 28, 1978 decision concerning the identical legal, factual and historical issues, also held that title to the original alleyways in the District of Columbia resided in the owners of the abutting lots, not in the United States. (Attached hereto as Appendix D, App. 52a.) Both the Superior Court and the District Court rejected the Court of Claims' interpretation of President Washington's building regulations. App. 42a-49a, 54a. The appeal of the *Carr* decision[3] has been stayed pending the outcome of

[2] On November 8, 1977, Petitioners filed a motion for an extension of time in which to file a Petition for Rehearing on the basis that the decision in the Superior Court for the District of Columbia in *Chesapeake & Potomac Telephone Co.* v. *District of Columbia, et al.*, Civil Action No. 2671-75 (consolidated), involving identical issues, appeared to be imminent. By order of November 10, 1977, this Court granted the motion for an extension of time in which to file a Petition for Rehearing until February 11, 1978. By orders of February 10, 1978 and March 13, 1978, the time for filing was further extended to April 10, 1978.

[3] Pending in the United States Court of Appeals for the District of Columbia Circuit as *Carr* v. *District of Columbia*, No. 79-1571.

the *C&P Telephone Co.* appeal[4] in the District of Columbia Court of Appeals.

On the basis of the divergent judgments between the Court of Claims and those of the Superior Court of the District of Columbia and the U.S. District Court for the District of Columbia, petitioners filed an independent action for relief from the Court of Claims' judgment on December 5, 1978. On July 18, 1979, the Court of Claims granted the respondent's Motion to Dismiss. Petitioners' timely Motion for Reconsideration, Rehearing or, in the Alternative, Suggestion for Rehearing *En Banc*, was denied on September 28, 1979. In granting respondent's motion to dismiss, the Court of Claims held that an independent action for relief from a judgment due to a change in law is not available unless the facts of the case indicate common participants in an accident, the removal of some but not all claims to the Federal courts by diversity, and conflicts between the Federal courts and state dispositions where the Federal courts should have conformed to state law by *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

Petitioners seek review of the Court of Claims ruling where the Court's prior decision was based on an interpretation of regulations issued by President George Washington relating to the original City of Washington, which interpretation was rejected by both local federal and state courts. The other questions presented for review are stated above.

[4] Pending in the District of Columbia Court of Appeals as *United States* v. *C&P Telephone Co.*, Nos. 13570, 14206, 79-499. Oral argument was held on October 23, 1979.

REASONS FOR GRANTING THE WRIT

I.

The Court of Claims' Holding That Petitioners Are Not Entitled To Relief From Judgment Due To A Change In Law Was Error. Further, The Decision Is Based Upon A Point Expressly Left Undecided By This Court In *Polites* v. *United States*[5] Which Is In Need Of Clarification.

The independent action[6] below sought relief from the final judgment of the Court of Claims entered on October 20, 1976 which held that title to original alleyways was in the United States. At the time the Court of Claims rendered its initial decision, the only local, substantive case law specifically addressing the title to original alleys was the District Court decision in *Carr* v. *District of Columbia*, 371 F.Supp. 293 (D.D.C. 1974), *aff'd without opinion*, 521 F.2d 324 (D.C. Cir. 1975), *modified*, 177 U.S. App. D.C. 432, 543 F.2d 917 (1976) wherein all parties had assumed that title was in the United States.[7] Subsequent to the Court of Claims' decision, the District Court entertained an independent action under Federal Civil Rule 60(b) by the plaintiff in the *Carr* case and concluded that ownership of the alleys was not in the United States. App. 52a. In a separate, but related action, the Superior Court of the District of Columbia, in *C&P*

[5] 364 U.S. 426 (1960).

[6] The action was predicated on Court of Claims Rule 152(b), which is virtually identical to Federal Rule of Civil Procedure 60(b). *Carney* v. *United States*, 199 Ct. Cl. 160, 462 F.2d 1142 (1972). Accordingly, federal court decisions involving Rule 60(b) are considered precedents in applying Rule 152(b). *Algonac Manufacturing Co.* v. *United States*, 198 Ct. Cl. 258, 458 F.2d 1373 (1972); *Love* v. *United States*, 122 Ct. Cl. 144, 104 F.Supp. 102 (1952).

[7] Other prior judicial decisions have discussed but not decided the issue with the clear implication that title to original alleys is not necessarily in the United States. See pp. 20-21, *infra*.

Telephone v. *District of Columbia*, 106 Wash. Law Reporter 1065 (June 13, 1978) also had concluded that, contrary to what had previously been thought, title to original alleys was not in the United States. App. 10a. Based on this clear and authoritative change in the local governing law, petitioners sought relief from the Court of Claims' prior decision.

In denying petitioners' independent action, the Court of Claims held that relief from judgment due to a change in law is limited to cases involving "common participants in an accident, the removal of some but not all claims to the federal courts by diversity, and conflicts between the Federal Courts and state dispositions though the federal courts should have conferred to state law by *Erie RR* v. *Tompkins*, 304 U.S. 64 (1938)." App. 6a-7a. The holding clearly conflicts with the Court of Claims' decision in *Amsden* v. *United States*[8] and with the decisions of other federal courts.

(a) In *Amsden*, the Court of Claims granted Rule 152(b) relief stating, "we are not willing to permit a strict application of the doctrine of *res judicata* to prevent us from reaching a conclusion which is consonant with our sense of justice." For the Court of Claims to now hold that relief from judgment due to a change in law is limited to cases involving common accidents or *Erie* considerations is totally contrary to its *Amsden* decision.

(b) In *Tarkington* v. *United States Lines Co.*, 222 F.2d 358 (2d Cir. 1955), a Rule 60(b) motion was granted on the ground that a case decided subsequent to the instant case laid down a legal rule contrary to that applied in the cases on which the trial judge in the instant case had relied. In so holding the Second Circuit did not limit relief to cases involving common accidents or *Erie* considerations but based its decision on the need to do justice under the circumstances of the particular case before it.

[8] 146 Ct. Cl. 809, 175 F.Supp. 147 (1959).

(c) In *Tsakonites* v. *Trans Pacific Carriers Corporation*, 322 F.Supp. 722 (S.D.N.Y. 1970), the Court granted Rule 60(b) relief in light of a change in law, stating that it was "in the interest of justice in the exceptional circumstances of this case to grant Tsakonites his day in court . . . ." 322 F. Supp. at 725. Again, in reaching its decision, the Court did not limit relief to cases involving common accidents or *Erie* considerations, but based its decision on the need to do justice under the circumstances of the particular case before it.

(d) As case law indicates, a Rule 60(b)(6) action for relief from a judgment can be predicated on a change in the law. This Court has itself recognized on at least three occasions, that a change in law can necessitate relief from a judgment, "where justice so requires," *Klapprott* v. *United States*, 335 U.S. 601 (1949); *Ackerman* v. *United States*, 340 U.S. 193 (1950); *Polites* v. *United States*, 364 U.S. 426 (1960). The precise question whether 60(b) authorizes relief for a change of law, however, was expressly left open in the *Polites* case when this Court found that it:

> "need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law, relief under Rule 60(b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law. The fact of the matter is that that situation is not presented in this case." *Polites* at 433.

In the present case, that situation is squarely faced and it is urged that the Court finally decide whether a change in law such as that presented here can serve as the basis for an independent action for relief from judgment.

(e) The *Pierce* v. *Cook* case, 518 F.2d 720 (10th Cir. 1975), cited by the Court of Claims as authority for its novel position that Rule 60(b) relief due to a change in

law is limited to common accident situations or *Erie* considerations, in fact supports the granting of Rule 60(b) relief under the circumstances of this case. The underlying policy of *Erie* of promoting uniform administration of the laws moved the court to grant relief in *Pierce*, and those same considerations are present here.

II.

The Court Of Claims' Refusal To Defer To The Decisions Of The Local State And Federal Courts Violates The Principles Laid Down By This Court in *Erie*.

In *Erie* this Court held that, "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state." In refusing to apply the decisions of the local state and federal courts on the issue of title, the Court of Claims violated this principle.

The decision in *Erie* was based on a cardinal precept of American law: the principle of fairness. As stated by Judge Cardozo:

> "It will not do to decide the same question one way between one set of litigants and the opposite way between another. . . . One of the fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor . . . ." B. Cardozo, *The Nature of the Judicial Process*, 33, 112 (1921).

In accordance with this principle, one of the twin aims of *Erie* was the avoidance of inequitable administration of the laws. *Hanna* v. *Plumer*, 380 U.S. 460 (1965). This is the precise mischief which the Court of Claims' decision has worked.

Further, where, as here, the local courts have authoritatively settled a substantive issue in direct conflict with the Court of Claims' prior decision, it is clear that relief

from the earlier judgment should be granted and can be the basis for an independent action. This is especially true where the local courts have taken notice of the Court of Claims' decision and expressly stated that it is erroneous. App. 49a, 59a. Accordingly, in the interest of furthering the *Erie* policy of federal-state conformity, the Court of Claims' decision not to defer to the decisions of the local state and federal courts should be reversed.

III.

The Court Of Claims' Decision To Grant The Respondent's Motion To Dismiss On The Basis Of "Equity" Determinations Was Clearly Erroneous When No Factual Basis For Such Determinations Was Contained In Either The Complaint Or Record And No Evidentiary Proceedings Were Permitted.

The essential elements of equitable estoppel as related to the party estoppel were established by the court in *Parker* v. *Sager*, 85 U.S. App. D.C. 4, 174 F.2d 657, 661 (D.C. Cir. 1949). Applying those principles to the present case, it is clear that the requirements of estoppel are not satisfied. The Court of Claims' opinion is totally devoid of any facts concerning misrepresentation or concealment or knowledge of the real facts. The Court's statement that petitioners were "on notice that at least there was a colorable claim the United States did not own the alleys, from decisions [9] they themselves cite and rely on here" does not support estoppel. As this Court stated in *Crary* v. *Dye*, 208 U.S. 515, 521 (1908):

> "And in respect to the title of real property, the party claiming to have been influenced by the conduct or declaration must not only have been destitute of knowledge of the true state of the title, but also of

[9] *Fitzhugh* v. *United States*, 59 App. D.C. 285, 40 F.2d 797 (1930); *Brooks* v. *Brooks*, XXVIII Wash. L. Rptr. 335 (Sup. Ct. D.C. 1900).

> any convenient and available means of acquiring knowledge. Where the condition of title is known to both parties, *or both have the same means of ascertaining the truth, there can be no estoppel.*" (Emphasis added.)

See, also, *Oklahoma* v. *Texas*, 268 U.S. 252, 257 (1925); *Brant* v. *Virginia Coal & I Co.*, 93 U.S. 326, 337 (1876).

Further, in view of the fact that an alley could only be closed upon a finding that it was *unnecessary* and *useless*, it is difficult to see what detriment the District could possibly have suffered by reason of such closings.[10] In this regard, the Court of Claims' earlier finding that the City Council relied on the closing of the streets and alleys to its detriment is totally erroneous. 211 Ct. Cl. 145, 152-53.

Finally, the identical estoppel argument was specifically rejected by Judge Flannery in *1776 K Street Associates* v. *District of Columbia*, Civil Action No. 2015-70, when he stated:

> "4. 1776 K Street Associates is not estopped from maintaining this action. The doctrine of estoppel is inapplicable where the plaintiff challenges an agreement with the government on the grounds that the government acted beyond its statutory authority. See *Peoples Bank* v. *Eccles*, 161 F.2d 636, 644 (D.C. Cir. 1947), *rev'd on other grounds*, 333 U.S. 426 (1948). Furthermore, the elements of equitable estoppel are not present because 1776 K Street Associates did not misrepresent or conceal any material fact. See *Parker* v. *Sager*, 174 F.2d 657, 661 (D.C. Cir. 1949). A mutual mistake of law does not give rise to estoppel. *Cf, Crosley Corp.* v. *United States*, 229 F.2d 376, 381 (D.C. Cir. 1956)."

The Court of Claims' obvious confusion as to when the doctrine of estoppel applies is further evidenced by its

[10] See *Puget Sound Alumni of Kappa Sigma* v. *City of Seattle*, 422 P.2d 799 (Wash. 1967).

decision to reverse itself. In its prior decision the Court of Claims held that the holding on estoppel in the above *1776 K Street Associates* case was clearly inapposite,

> "because the decision there was based on the lack of authority of the District of Columbia Council to charge for the closing of a non-original alley owned by the District of Columbia, whereas, in the instant case we are dealing with an *original* street and *original* alleys which the defendant contends are owned in fee simple by the United States and which Congress has authorized to be closed and charges collected therefor by the District of Columbia Council as its agent. There is no lack of authority to make the charges in this case. . . . On the other hand, if the United States did not have title . . . the plaintiffs would be entitled to refunds of the money paid. . . ." App. 67a-68a.

In its July 18, 1979 opinion, the Court of Claims reversed itself. It assumed, as it must for purposes of the motion to dismiss, that title to the alley land was not in the United States and thus the District of Columbia Council would have lacked authority to make charges for the closings of the alleys. The court then went on to apply the doctrine of estoppel totally contradicting its earlier decision that, under these facts, the doctrine is not applicable.

Further support for the position that petitioners are not estopped is found in the history of *Carr* v. *District of Columbia*, Civil Action No. 77-445 (*Carr II*). Clearly, if estoppel applied, it would have barred the independent action allowed by both the United States Court of Appeals and the District Court.[11] It is indeed ironic that

[11] In its opinion and order of December 22, 1977, the District Court stated: "Here the newly discovered records are not in what would be considered a "normal" location and the facts indicate that plaintiffs did diligently search the District of Columbia records that were available. The representations of the District's Surveyor and Corporation Counsel's Office are also critical." See also App. 53a-54a.

plaintiffs in *Carr* were given independent action relief, but that petitioners herein, who actually found the underlying evidence of title and upon whom *Carr* depended (see 543 F.2d at 921, fn. 13), were not even permitted to present evidence to the Court of Claims either on the merits or on the issue of estoppel. Since no appellate review is available from the Court of Claims' decision, only this Court upon certiorari proceedings can correct this gross miscarriage of justice.

IV.

The Court Of Claims' Erroneous Determination Of The Title Issue Amounts To A Taking Of Petitioners' Property In Violation Of The Fifth Amendment To The Constitution.

The refusal of the Court of Claims to set aside its prior erroneous determination amounts to a deprivation of petitioners' property in violation of the Fifth Amendment to the Constitution. No more cogent statement of this fact could be offered than that of the United States District Court for the District of Columbia in *Oliver T. Carr, Jr.* wherein the Court held:

> In essence, the District argues that pursuant to [§ 7-302, D.C. Code (1973)] the Mayor and the Council of the District of Columbia are vested with the authority to sell land that is privately owned and not the property of the District of Columbia or the United States. It is difficult to imagine how such a result could be justified on a proper interpretation of the statute. Section 7-302 is merely a perpetuation of the erroneous presumption that title to the original alleys is in the United States. *Washington Medical Center* v. *United States*, 545 F.2d 116, 134-35 (Ct. Cl. 1979) is an example of the same error. App. D.

Under the rules governing a motion to dismiss, the Court of Claims was required to accept the conclusions of the

D.C. Superior Court and United States District Court that petitioners owned the land previously devoted to alley use. With this major premise, it is hornbook law that the Fifth Amendment of the Constitution would not permit the United States to extract payment from the owners. See generally 16A C.J.S., *Constitutional Law*, § 599 (1959); 16A Am.Jur.2d *Constitutional Law* § 585 (1979).

Petitioners are the successors in title to the original proprietors and original purchasers of lots and alleyways which were conveyed pursuant to the original deeds of trust.[12] The United States acquired no title to alleys and no interest beyond police power regulations, and consequently the owners cannot be forced to buy their own land or to pay to remove the alley use once the use has been terminated by the City. In this connection the court in *Puget Sound Alumni of Kappa Sigma* v. *City of Seattle*, 422 P.2d at 802, stated:

> The legislative powers of a city must be exercised for the public benefit, but that does not authorize a municipality to sell or bargain legislation as a means of obtaining revenue. It would be a novel proposition to hold that a city, as a condition precedent to the exercise of its lawful power and authority to vacate a street or alley no longer needed for public use, could demand and receive from private parties a sum of money for its action. Such a holding would be dangerous in principle, contrary to good morals, and against public policy." (Quoting from *Lockwood & Strickland Co.* v. *City of Chicago*, 117 N.E. 81 (Ill. 1979)).

[12] See text of deeds in *Morris* v. *United States*, 174 U.S. 196, 202-206 (1898).

V.

The Court Of Claims Decision To Deny The Independent Action Constituted An Abuse Of Discretion Subject To Review By This Court.

A motion under rule 60(b) or an "independent action" gives the court a "grand reservoir of equitable power to do justice in a particular case." *Radock* v. *Norwegian American Line Agency, Inc.*, 318 F.2d 538 (2nd Cir. 1963). Recent cases applying Rule 60(b) have uniformly held that it must be given a liberal construction and that any doubt should be resolved in favor of the petition to set aside the judgment. *Tozer* v. *Charles A. Milling Co.*, 189 F.2d 242 (3rd Cir. 1951). Although relief from judgments, orders, or other proceedings rests in the sound discretion of the court, "The discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles." *Chicago & N.W. Ry. Co.* v. *Davenport et al.*, 95 F.Supp. 469 (D.C. Iowa 1951). Further,

> "*that discretion should ordinarily incline towards granting, rather than denying, relief.* This is especially true if no intervening rights have attached in reliance upon the judgment and no actual injustice will occur. *In Re Cremida's Estate*, 14 FRD 15 (Alaska 1953). (Emphasis added.)

While it is true that many of the decisions interpreting Rule 60(b) have been concerned with cases involving default judgments, the power vested in the courts under Rule 60(b) is sufficient to enable them to vacate judgments whenever such action is appropriate to accomplish justice.[13] In essence, any case presenting the question of substantial rights should be resolved in favor of the petition to set aside the judgment where a litigant has not

[13] See, *e.g.*, *Pierce, Tsakonites, Tarkington, Amsden, Hyjack* v. *Nolan*, 366 A.2d 715 (New Jersey Super. Ct. 1976).

been afforded the opportunity to have a fair hearing. This is especially true in the present case where upon cross motions for summary judgment, in which petitioners asserted that title to the original alleys was not in the United States and respondent did not assert the contrary, the Court of Claims, *sua sponte*, decided that title is in the United States on the basis of a legal theory not presented by the parties, without considering petitioners' undisputed documentary evidence and without affording petitioners an opportunity to meet such new legal theory or to cure technical deficiencies of proof which the court found in part of petitioners' evidence.

VI.

The Decision Below Conflicts With Decisions Of This Court, The United States Circuit Court Of Appeal For The District Of Columbia, The Highest Local Court Of The District Of Columbia And With Other Legal Authorities And Contemporaneous Interpretations.

The heart of petitioners' independent action below was that although the Court of Claims undertook to decide the "crucial and controlling question" of title to original alleys in the District of Columbia, the local and federal courts within the District of Columbia have ruled contrary to the decision of the Court of Claims on both the historical facts and the applicable law. Further, the prior decision of the Court of Claims is in direct conflict with holdings underlying a prior decision of this Court, with numerous decisions of local and federal courts of appeal of the District of Columbia and with other legal authorities as well as contemporaneous interpretations of the deeds of trust and the status of the title to the soil of the alleys.

(a) The Superior Court of the District of Columbia, the local court of general jurisdiction, faced with the identical legal, factual and historical issues in *Chesapeake*

and Potomac Telephone Company, pronounced the substantive law of the District of Columbia and held that title to the original alleyways in the District of Columbia was not in the United States, but was in the owners of the abutting lots. (App. 31a-40a, 50a.)

In the case of *Oliver T. Carr, Jr.*, the United States District Court for the District of Columbia, having the full benefit of this Court's October 20, 1978 decision concerning the identical legal, factual and historical issues, granted an independent action to set aside its prior decision and held that title to the original alleyways in the District of Columbia resided in the owners of the abutting lots, not in the United States. Specifically the court stated:

> "Section 7-302 is merely a perpetuation of the erroneous presumption that title to the original alleys is in the United States. *Washington Medical Center* v. *United States*, 545 F.2d 116, 134-35 (Ct. Cl. 1976) is an example of the same error. As Judge Penn concluded: 'although some past court opinions have suggested that title to the alley was in the United States, those opinions were rendered at a time when the original documents were not before the court or the court did not have an opportunity to consider those documents.' " (App. 59a.)

Further, the Superior Court and the District Court both rejected the Court of Claims' interpretation of the regulations issued by President George Washington relating to the original City of Washington. App. 42a-49a, 54a.

In view of the fact that the local and federal courts within the District of Columbia have now decided the substantive question of fee simple title to original alleys, it is petitioners' contention that the Court of Claims should have deferred to those substantive decisions and should at the minimum have granted a trial to be held on the available evidence relating to the right of the District of

Columbia to impose a charge of fair market value to petitioners to close abutting alleyways which are no longer useful or necessary.

(b) The Court of Claims disregarded this Court's decision in *Pratt* v. *Law*, 13 U.S. (9 Cranch) 453, 490 (1815). In *Pratt*, this Court recognized that if original alleys were not "comprised under the denomination of streets," they were appurtenances to the abutting lots. The Court of Claims acknowledged that the alleys were not streets but refused to accept the necessary alternative. *Pratt* held that, in a sale between successors in title to original purchasers and a subsequent purchaser of lots, compensation could not be charged the subsequent purchaser for the soil of the alley since the alley easement had not merged with the fee. The critical point is that, unless the soil of the alley was owned by the abutting owner, the principle of merger could not have been an issue since there would be nothing to merge. *Pratt*, thus, implicitly held that the alleys were part of the residue of the land, title to which vested in the original proprietors or the various purchasers at public auction, and not in the United States.[14]

(c) The Court of Claims also flatly refused to apply the decision of the Supreme Court of the District of Columbia in *Brooks* v. *Brooks*, XXVIII Wash. L. Rptr. 335 (May 8, 1900)[15] and the decision of the United States Court of

---

[14] It is clear from the historical record that the alleys were never purchased by the United States as part of the second category of land and the United States has never claimed to have purchased the alleys. On the contrary, in *Pratt*, at 476, this court found that "It was the universal practice for the Commissioners in selling lots to charge each lot with its proportion of the alley laid out for the benefit of the lots in the squares. . . ."

[15] Attached to the *Brooks* decision is the Legal Opinion of Hugh T. Taggart, Esq., Assistant United States Attorney for the District of Columbia, dated April 30, 1888, concluding that title to the soil of original alley is in the abutting property owner. Mr. Taggart argued the *Morris* case in this Court.

Appeals for the District of Columbia Circuit in *Fitzhugh* v. *United States*, 59 App. D.C. 285, 40 F.2d 797 (1930). This refusal to apply local law violates the principles laid down by the Court in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). *United States* v. *Yazell*, 382 U.S. 341, 352 (1966). It calls for the exercise of this Court's supervisory power over the federal courts. *Stoner* v. *New York Life Insurance Co.*, 311 U.S. 464 (1940).

VII.

The Issue Of Title To Original Alleys In The District Of Columbia Is Of Major Importance Not Only To The Present Litigants But To Future Litigants.

The question of title to the original alleys of the City of Washington is of sufficient importance to merit review by the Court. As the development of the District proceeds, the issue of ownership of the original alleys will continue to arise. The court has previously decided matters involving the Federal City, such as the title questions with regard to public streets, public appropriations, riparian rights and lands beyond the bulkhead lines. See *Van Ness* v. *City of Washington*, 29 U.S. (4 Peters) 323 (1930); *Morris* v. *United States*, 174 U.S. 196 (1898); *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U.S. 672 (1884). The issue of title to the original alleys is the only remaining title issue yet to be clearly determined by the Court under the original Deeds of Trust establishing the City of Washington. A decision by this Court is necessary to resolve existing conflicts between decisions on this issue and to govern future alley closings, necessary to orderly land development in the down town areas of the District of Columbia. As stated by the Court of Claims in its former decision:

> "We have concluded that the crucial and controlling question is the title issue, and that it should be decided not only for the purpose of disposing of the present cases, but also as a precedent for the solution

of other like claims we understand are pending, and others that will no doubt arise in the future. A decision of the title issue is vital, because if the U.S. owned the street and alleys in fee simple at the time of the closings, Congress had the power to authorize the District of Columbia Council to charge for their sale (closings, and vesting of title in Plaintiffs), because they were government property. On the other hand, if the U.S. did not have title in fee simple to the street and alleys at the time they were closed, Congress would not have the power to authorize the council to charge for their closing, as the government cannot sell property it does not own. In the latter case the charges would be unauthorized and the Plaintiffs would be entitled to refunds of the money paid if the Plaintiffs themselves had title to the property." App. 68a.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted, or in the alternative the Court should summarily reverse and remand the case to the Court of Claims for full consideration of petitioners' evidence and trial on the issue of title to the soil of the alleys.

Respectfully submitted,

By

WHAYNE S. QUIN
1666 K Street, N.W.
Suite 600
Washington, D.C. 20006
Attorney for Petitioners

Of Counsel:

MAUREEN DWYER STEWART
WILKES & ARTIS,
CHARTERED
1666 K Street, N.W.
Suite 600
Washington, D.C. 20006

Appendices

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 531-78

(Decided July 18, 1979)

1776 K STREET ASSOCIATES, THE METROPOLITAN CLUB OF THE CITY OF WASHINGTON, D. F. ANTONELLI, JR., WASHINGTON MEDICAL CENTER, INC., et al.

v.

THE UNITED STATES

Whayne S. Quin, attorney of record for plaintiffs. *Michael B. McGovern*, and *Wilkes & Artis*, of counsel.

Thomas L. McKevitt, with whom was *Assistant Attorney General James W. Moorman*, for defendant. *William E. Hill*, of counsel.

Before FRIEDMAN, *Chief Judge*, NICHOLS and BENNETT, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS

PER CURIAM: This case is that somewhat rare creature in our jurisprudence, the "independent action" under permission of Rule 152(b)—

> * * * [T]o relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. * * *

Such an action, when it can be brought, lifts the bar of res judicata. Since ours is a court of limited jurisdiction, often inhibited in doing what would seem useful by the strict construction of the consent to be sued, we have had to consider carefully what this rule implies or expresses. *See Carney* v. *United States*, 199 Ct. Cl. 160, 462 F.2d 1142 (1972); *Andrade* v. *United States*, 202 Ct. Cl. 988, 485 F.2d 660 (1973), *cert. denied*, 419 U.S. 831 (1974).

This newly filed and numbered suit prays for relief from a judgment of this court in *Washington Medical Center* v. *United States*, 211 Ct. Cl. 145, 545 F.2d 116 (1976), *cert. denied*, 434 U.S. 902 (1977). The present parties were all plaintiffs in the former cases, which were consolidated. The object in those cases was to recover moneys paid to the District of Columbia, as agent for the United States, as fees to obtain closing of alleys adjacent to plaintiffs' properties. The holding was that the moneys were properly collected, because the alleys were "original" alleys which belonged in fee to the United States. Plaintiffs do not accept this conclusion. In the former cases they twice moved for rehearing, without success, and now in this "independent action" they state their objections for the third time. Defendant moves to dismiss. We conclude that plaintiffs do not state a cause that could prevail as an "independent action" under any facts alleged in their petition, and, therefore, the petition must be dismissed.

Plaintiffs move for oral argument, but we decide the case without any, per Rule 146(b), as we think the reasons asserted for lifting the bar of res judicata insufficient, without regard to the correctness of the former decision.

Plaintiffs have two non-frivolous reasons for coming here again. One is that a series of new discoveries in the National Archives shows, they say, that the original conveyances by the original proprietors to trustees did not convey any title in the alleys to the United States. Some of this new evidence was disclosed with the two former motions for rehearing, some has been found more recently. The other reason is a change in the "legal climate." Recent successful litigation by one of these plaintiffs, involving other alleys, in another court, and by third parties, also in another court, have been made possible apparently, by placing the required payments for alley closing in escrow, making the suits not against the United States and not subject to the exclusive jurisdiction of this court. *Chesapeake & Potomac Tel. Co.* v. *District of Columbia*, D.C. Superior Court, Penn, *J.*, March 28, 1978, reported Washington Law Reporter, June 13, 1978; *Carr* v. *District of Columbia*, U.S. District Court, District of Columbia, January 12, 1979, mem. op., Flannery, *J.* Judge Penn was informed of this court's decision but attached little weight to it because he thought it was based on less than the entire body of evidence. Judge Flannery took the same view. He treated the Penn decision as collateral estoppel, but not this court's.

The correctness of our former decision has been reexamined already, and the Supreme Court has denied certiorari. That decision on its record, must be regarded as unchallengeable. To review the new evidence, unless the grounds for doing so are adequate, would perpetrate the very evil the doctrine of res judicata guards against. For purposes of the motion to dismiss, we must assume, arguendo, therefore, that the new evidence possibly could convince this court that title to the involved alleys was not in the United States, and determine whether, if this were so, the grounds for reopening would be otherwise adequate. As stated in *Andrade*, *supra*, the petition in an

"independent action" of the kind involved really addresses the equity side of the court. Despite the well publicized exclusion of equitable relief from the remedies available here, a claim for money is not barred merely because it rests on equitable grounds. *Pauley Petroleum, Inc.* v. *United States*, 219 Ct. Cl. ——, 591 F.2d 1308 (1979). The trouble with the petition here is that it is wanting in equity.

In the previous decision, we reserved the question of estoppel, preferring to decide on the legal issue of who owned the alleys. We consider here whether assuming arguendo the United States did not own them, is retention of fees for closing them unjust enrichment? We conclude it is not. The plaintiffs, as is conceded, paid the fees voluntarily without objection or protest. Their own explanation for doing so is that if they had not, the district government, with all its powers, could have delayed projects plaintiffs wanted to proceed with. Plaintiffs were on notice that at least there was a colorable claim the United States did not own the alleys, from decisions they themselves cite and rely on here. *Fitzhugh* v. *United States*, 59 App. D.C. 285, 40 F.2d 797 (1930); *Brooks* v. *Brooks*, XXVIII Wash. L. Rptr. 335 (Sup. Ct. D.C. 1900). On the other hand, they had no reason to charge that the claim of United States title was in bad faith. The conclusion seems irresistible that plaintiffs paid to secure whatever title the United States had or to remove a cloud on the title, and to obtain ability to close the alleys without litigation. In this regard, they obtained their money's worth. Plaintiffs say they paid under a mistake. If so, it was a mistake of judgment and not the kind of mistake for which equity will grant relief.

Plaintiffs knew or should have known that moneys paid to the United States without protest are not recoverable on the mere basis that such moneys were not

legally due. *United States* v. *Edmonston*, 181 U.S. 500 (1901); *Rough Diamond Co.* v. *United States*, 173 Ct. Cl. 15, 26, 351 F.2d 636, 642 (1965), *cert. denied*, 383 U.S. 957 (1966). *Rough Diamond* distinguishes a case where money was exacted in violation of a law written for protection of the payor. *Applied Devices Corp.* v. *United States*, 219 Ct. Cl. ——, 591 F.2d 635 (1979), illustrates the principal applied in that exception. It is not applicable here. The recovery of money paid the United States by alleged mistake requires a "clear and convincing" showing of the nature of the mistake. *Pauley Petroleum, Inc.* v. *United States*, 219 Ct. Cl. at ——, 591 F.2d at 1320-21. In that case, as here, the mistake was one of judgment. The question of recovery of money paid by mistake there receives an exhaustive examination which need not be repeated here.

In *Amsden* v. *United States*, 146 Ct. Cl. 809, 175 F. Supp. 147 (1959), plaintiff had been a party to a pay case which was settled by stipulation. He acquiesced in a pay computation reduced by a mistaken application of the Economy Act. Later, learning of the error from other litigation, he moved to reopen, but the court refused. Defendant, opposing reopening, said plaintiff should file another petition. He did so, and the suit was manifestly an "independent action." He was allowed to prevail. The grounds were: that the scope of the Economy Act was not really adverted to as the subject of the former litigation, and that the defendant had invited plaintiff to bring another suit when the original one could have been reopened. This was a decision by Judge Madden, that master of the equitable approach, and it may be noted that Chief Judge Jones dissented on res judicata grounds. The equities relied on by Judge Madden are not present here: the issue litigated in the former decision is really the same as proposed here, and defendant to say the least never invited plaintiffs to bring an "independent

action." There was an unjust enrichment of defendant in *Amsden* not demonstrable here. There is no clear showing of the nature of the mistake, as there was in *Amsden*.

As regards the newly discovered evidence, plaintiffs appear to have joined with defendant in the previous case in submitting it on summary judgment. They do not appear to have protested that research in the Archives was incomplete. The panel would not have rushed to decide the case if warned as to what apparently was the fact, that the search for evidence was still unfinished. It would have allowed more time for research. A party who submits a case on incomplete or inaccurate testimony cannot, in this court, reopen with new evidence unless he convinces the court that the defects in the previous testimony were present without his fault or negligence. *Kaiser Aluminum & Chemical Corp.* v. *United States*, 187 Ct. Cl. 443, 409 F.2d 238 (1969) (concurring opinion). As the concurring opinion referred to had the adherence of four of the seven judges who heard the case, it is clear it must be regarded as an alternate ground. The same counsel represented the plaintiffs in the original *Washington Medical Center* case here, then in the Superior Court, and then in filing of the present "independent action." He does not attempt to explain why he did not educate our panel as to the insufficiency of the evidence he now alleges.

Finally, we turn to the effect in equity of the existence of decisions subsequent to the one to be reopened, in conflict, and allegedly based on better facts or law. Plaintiffs cite a number of cases, of which *Pierce* v. *Cook Co.*, 518 F.2d 720 (10th Cir. 1975) is typical. They involve common participants in an accident, the removal of some but not all claims to the Federal courts by diversity, and conflicts between the Federal courts and state dispositions though the Federal courts should have conformed

to state law by *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). In such circumstances, a Federal court may look with aversion on instances when its decisions may end up in conflict with state ones and seek to effect correction by F.R. Civ. P. 60(b), the counterpart of our Rule 152. Defendant says that in the absence of such considerations, there is nothing in subsequent conflicting decisions, per se, to oblige a court to reopen its own previous decisions, once res judicata, even if the later decisions convince the court its earlier decisions were wrong. *Pierce* was heard *en banc* and four judges dissented. The majority analysis affords persuasive evidence that defendant's statement is correct. Short of the compelling circumstances before that court, the result would have been different.

Plaintiffs do not allege that our former decision is having an adverse collateral estoppel or res judicata effect on other cases. The decisions they do cite would refute such a claim if made. Independent of getting the fees back, plaintiffs say they would like to expunge the holding we made respecting the United States having title to the alleys but they fail to explain why the latter is important to them. They have the alleys. The defendant has the fees, but under circumstances where we fail to see unjust enrichment.

The petition therefore does not present allegations, that, if true, would warrant a breach of the res judicata bar. The claim is res judicata. A reexamination of its original grounds, or a reopening of the record to receive new evidence is not now permissible under that doctrine. *United States* v. *Sioux Nation*, 207 Ct. Cl. 234, 518 F.2d 1298, *cert. denied*, 423 U.S. 1016 (1975). The defendant's motion to dismiss is therefore sustained, and the petition is dismissed.

APPENDIX B

EXHIBIT B

IN THE UNITED STATES COURT OF CLAIMS

No. 531-78

Sep. 28, 1979

1776 K STREET ASSOCIATES, THE METROPOLITAN CLUB OF THE CITY OF WASHINGTON, D. F. ANTONELLI, JR., WASHINGTON MEDICAL CENTER, INC., et al.

v.

THE UNITED STATES

DENIAL OF PETITION FOR RECONSIDERATION, REHEARING OR IN THE ALTERNATIVE, FOR REHEARING EN BANC

Whayne S. Quinn, attorney of record for plaintiffs. *James A. Stenger* and *Wilkes & Artis*, of counsel.

Thomas L. McKevitt, with whom was *Assistant Attorney General James W. Moorman*, for defendant. *William E. Hill*, of counsel.

Before FRIEDMAN, *Chief Judge*, NICHOLS and BENNETT, *Judges*.

ORDER

Plaintiffs' motion for reconsideration or rehearing is hereby denied. To explain why they paid for something they already owned, plaintiffs deny they knew their own title was good. This is different from the ordinary pur-

chaser's claim of ignorance of a defect in a seller's title. That portion of the opinion which states that plaintiffs had notice of a possible claim the United States did not own the alleys, referring to existing case law, slip op. at 3-4, is not to be read as construing the local recording statutes of the District of Columbia nor as announcing a blanket rule of law for the District regarding constructive notice to bona fide purchasers of land. Rather this statement was to demonstrate that plaintiffs failed to show that the equities supported the extraordinary and rarely granted form of relief which they sought—the lifting of the bar of res judicata. A reading of *Fitzhugh* v. *United States*, 40 F.2d 797 (D.C. Cir. 1930), and *Brooks* v. *Brooks*, XXVIII WASH. L. RPTR. 335 (Sup. Ct. D.C. 1900) demonstrates that to say the least there was a possible dispute. Plaintiffs either knowingly disregarded these cases or failed properly to research the title in deciding to pay the fees exacted. "Notice" as used by this court is not intended to be the type of notice which recording statutes speak of but that notice which a prudent person paying money to the government would not disregard.

Plaintiffs failed to show that the equities were in their favor, and, therefore, the extraordinary relief sought by plaintiffs—a lifting of the bar of res judicata—was denied.

A majority of the judges in active service * not having voted for a rehearing en banc, plaintiffs' motion for that purpose is also denied.

BY THE COURT

/s/ Daniel M. Friedman
DANIEL M. FRIEDMAN
Chief Judge

---

* Judges Kunzig and Smith not participating.

APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

C.A. No. 2671-75

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Plaintiff

v.

DISTRICT OF COLUMBIA, et al.,
Defendants

C.A. No. 86-74

THE SUPREME COUNCIL,
Plaintiff

v.

DISTRICT OF COLUMBIA, et al.,
Defendants

C.A. No. 3107-75

6th & E ST., INC., SYLVAN C. HERMAN and
SAUL H. BERNSTEIN,
Plaintiffs

v.

DISTRICT OF COLUMBIA, et al.,
Defendants

C.A. No. 2672-75

ULYSSES AUGER and LULU AUGER,
Plaintiffs

v.

DISTRICT OF COLUMBIA, et al.,
Defendants

C.A. No. 783-75

BICENTENNIAL ASSOCIATES,
Plaintiffs

v.

DISTRICT OF COLUMBIA, et al.,
Defendants

C.A. No. 2670-75

WASHINGTON MEDICAL CENTER, INC.,
Plaintiff

v.

DISTRICT OF COLUMBIA, et al.,
Defendants

OPINION AND ORDER

These cases came before the Court on the joint motions for summary judgment filed by the plaintiffs and the cross motions for summary judgment filed by the defendants.

The plaintiffs are all owners of land in the District of Columbia who filed applications with the District of Columbia requesting the District to close portions of public alleys abutting on their land in the City. The applications were granted by the District and the alleys were closed either pursuant to the Street Readjustment Act of the District of Columbia (D.C. Code 1973, §§ 7-401 *et seq.*) or D. C. Code 1973, §§ 7-306 and 7-307. There were no written objections filed to the applications however, as a condition precedent to each closing, the District of Columbia Council ordered each of the plaintiffs to pay into escrow funds representing the fair market value of the alleys closed. Those funds have all been paid into escrow.

NOTE: Minor typographical errors have been corrected by Petitioners.

The plaintiffs challenge the authority of the District to make such a charge on the grounds that (1) the United States did not have title to the underlying fees reverting to the property owners upon closing of the alleys, (2) the District of Columbia lacks statutory authority to make such charges under Section 7-401 *et seq.* or Sections 7-306 and 7-307, (3) the land areas closed had only a nominal value and (4) the charges in violation of the District of Columbia Administrative Procedure Act and due process of law.

The defendants oppose the plaintiffs' motion and have filed cross motions of their own. They argue that the alleys, being original alleys, are owned by the United States. The defendants have also argued that the plaintiffs have failed to join an indispensable party in these proceedings, namely, the United States of America.

The Court heard final arguments in this case in February 1978 and on March 9, 1978, issued a Memorandum Order holding that it would grant summary judgment to the plaintiffs, and would thereafter file a formal written opinion.

I

The underlying facts surrounding these cases are as follows:

1. (a) Plaintiff Chesapeake and Potomac Telephone Company, at the time and for purposes herein alleged, was the owner of rights, title and interest in Lots 22, 825, 834 and 835 surrounding and abutting portions of a public alley in Square 288 in the District of Columbia.

(b) Plaintiff The Supreme Council, at the time and for the purpose herein alleged, was the owner of rights, title and interest in Lots 800, 808, 28, 29, 40, 41, 42, 105, and 106 surrounding and abutting portions of a public alley in Square 192 in the District of Columbia.

(c) Plaintiffs Sylvan C. Herman and Saul H. Bernstein at the time and for the purposes herein alleged, were the owners of rights, title and interest in Lots 18, 831, 833, 847, 848, 834, 21, 835 and 836 surrounding and abutting portions of a public alley in Square 457 in the District of Columbia.

(d) Plaintiffs Ulysses G. Auger and Lulu H. Auger, at the time and for the purposes herein alleged, were the owners of rights, title and interest in Lots 870, 871, 872, 873, 133, 134 and 135 in Square 70 surrounding and abutting a portion of a public alley in Square 70 in the District of Columbia and Lot 870 surrounding and abutting a portion of a public alley in Square 51 in the District of Columbia.

(e) Plaintiff Bicentennial Associates, at the time and for the purposes herein alleged, was the owner of rights, title and interest in Lots 113 and 879 surrounding and abutting a portion of a public alley in Square 100 in the District of Columbia.

(f) Plaintiff Washington Medical Center, Inc., at the time and for the purposes herein alleged, was the owner of rights, title and interest in Lots 849, 848, 838, 837, 827, 825, 844, and 42 surrounding and abutting portions of certain public alleys in Square 106 in the District of Columbia.

2. The District of Columbia Council and its members are the successors to the Board of Commissioners of the District of Columbia. They are authorized to close alleys in the District of Columbia pursuant to the provisions of the Street Readjustment Act of the District of Columbia, D.C. Code 1973, 7-401 *et seq.* and § 7-306 and 7-307.

3. The defendants District of Columbia and District of Columbia Council, hereinafter referred to collectively as "District of Columbia", (by virtue of Reorganization Plan No. 3, Section 402 (168), D.C. Code (1973)), at

the time herein alleged, did maintain jurisdiction and control of the portions of the public alleys in all of the squares which were closed in the cases consolidated before this court. The public alleys which are the subject of this action were original alleys of the City of Washington over which the District of Columbia maintained jurisdiction and control.

4. The alley areas involved in this litigation were portions of alleyways of the original City of Washington which have been generally referred to as "original alleys." Such original alleys were part of land conveyed to Trustees by certain landowners ("original proprietors") for the establishment of the seat of government for the United States in accordance with terms of Deeds of Trust executed around 1791 (hereinafter described only as Deeds of Trust.) The authority for negotiating for the acquisition or acceptance of the land for the original City of Washington was derived from Act of Congress adopted July 16, 1790 (1 Stat. 130, Chapter 28; District of Columbia Code, page XXXIII), as amended by Act of Congress approved March 3, 1791, (1 Stat. 214, Chapter 17, District of Columbia Code, page XXXIV).

5. (a) Plaintiff Chesapeake and Potomac Telephone Company, on December 9, 1971, filed with the Office of the Surveyor, D.C., and application pursuant to Section 7-408 proposing the closing of a part of the public alley abutting Lots 22, 825, 834 and 835 in Square 288.

(b) Plaintiff Supreme Council, on February 25, 1969, filed with the Office of the Surveyor, D.C., an application pursuant to Section 7-408, proposing the closing of a part of the public alley abutting Lots 800, 808, 40, 41, 42, 106 and 28 in Square 192.

(c) Plaintiffs Herman and Bernstein, on November 3, 1972, filed with the Office of the Surveyor, D.C., an application pursuant to Section 7-408, proposing the closing of

a part of the public alley abutting Lots 833, 847, 848, 834, 835, 836, and 38 in Square 457.

(d) Plaintiffs Ulysses and Lulu Auger, in September, 1972, filed with the Office of the Surveyor, D.C., an application pursuant to Section 7-408, proposing the closing of a part of a public alley in Square 70 abutting Lots 870, 871, 872, 873, 133, 134 and 135 and also filed an application in December, 1972, proposing the closing of a part of a public alley in Square 51 abutting Lot 870.

(e) Plaintiff Bicentennial Associates, in January, 1971, filed with the Office of the Surveyor, D.C., an application pursuant to Section 7-408, proposing the closing of a part of the public alley abutting Lots 113 and 879 in Square 100.

(f) Plaintiff Washington Medical Center, Inc. filed in the spring of 1971, an application with the Office of the Surveyor, D.C., pursuant to Sections 7-306 and 7-307, proposing the closing of part of the public alleys abutting Lots 849, 848, 838, 837, 827, 825, 844, and 42 in Square 106.

6. All applications were duly processed through the District of Columbia departments including the Department of Highways and Traffic, Department of Sanitary Engineering and through the utility companies and agencies concerned. Plaintiffs complied with all the statutory requirements and met all conditions imposed by the reviewing agencies and received their favorable recommendations. No objections were made to the closing by the abutting or nearby property owners or by any department or agency of the District of Columbia or the United States Government or by anyone else.

7. (a) By Resolution of March 7, 1972, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 288, with the title thereto in the plaintiff Chesapeake and Potomac Telephone Company.

(b) By Resolution of October 6, 1970, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 192 with title thereto in the plaintiff The Supreme Council.

(c) By Resolution of December 18, 1973, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 457 with title thereto in the plaintiffs Herman and Bernstein.

(d) By Resolution of January 23, 1973, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 70 with title thereto in the plaintiffs Ulysses and Lulu Auger. By Resolution of December 18, 1973, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 51, with title thereto in the plaintiffs Ulysses and Lulu Auger.

(e) By Resolution of October 19, 1971, the District of Columbia Council approved under Section 7-401 *et seq.*, the closing of the alley area in Square 100 with the title thereto in the plaintiff Bicentennial Associates.

(f) By Resolution of February 5, 1974, the District of Columbia Council approved under Section 7-306 and 7-307 the closing of the alley area in Square 106 with title thereto in the plaintiff Washington Medical Center, Inc.

8. As an additional condition precedent to the closing, the defendants District of Columbia and District of Columbia Council, purporting to act under color of authority contained in Sections 7-401 and 7-410, *supra*, and Sections 7-306 and 7-307, *supra*, required plaintiffs to pay the following amounts purportedly representing fair market value of the alley areas closed and the depreciated value of improvements within the alley area to be closed as indicated below. Except for the amount representing depreciated value of improvements paid by plaintiff The

Supreme Council directly to the District of Columbia, all moneys were placed in escrow.

Plaintiff	Fair Market Value	Depreciated Value
(a) C & P Telephone Co.	$ 47,850.00	$ 413.19
(b) The Supreme Council	11,133.56	5,820.00
(c) Herman and Bernstein	84,656.40	—
(d) Ulysses & Lulu Auger		
a. Square 70	16,875.00	208.65
b. Square 51	7,098.00	—
(e) Bicentennial Associates	29,172.00	1,512.62
(f) Washington Medical Center	599,258.00	—

9. In each closing pursuant to written agreement between the plaintiffs and the District of Columbia the funds representing charges for fair market value were placed in escrow with various District of Columbia banks and savings and loan institutions pending final judicial determination of the authority or lack thereof of the District of Columbia to make such charges against abutting property owners. The charges representing depreciated value of improvements were also placed in escrow except those paid by plaintiff The Supreme Council which were paid directly to the District of Columbia.

10. Pursuant to the terms of the Deeds of Trust the alley areas were part of that category of land to be divided equally with one-half the land to be assigned back to the original proprietors by the Trustees and the other half of the land to be assigned to the Commissioners to be sold to purchasers for value upon such terms and conditions as the President should deem proper.

11. Each of the alley areas involved in the instant litigation was placed in trust as part of the land area under the terms of the Deeds of Trust as described in paragraph 10 and were either assigned by the Trustees back to the original proprietors or were sold to purchasers for value other than the United States of America.

12. The original division and disposition of the land areas including the alley areas involved in this litigation is set forth as follows:

(a) The portion of the original alley closed in Square 288 (C & P Telephone Co.) abutted and was appurtenant to Lots 22, 825, 834 and 835. The original alley abutted original Lots 18, 19, 21, 22. Under the initial division of the square on January 30, 1797 these lots remained in the ownership of David Barnes, the original proprietor of the square.

(b) The portion of the original alley closed in Square 192 (The Supreme Council) abutted and was appurtenant to Lots 800, 808, 40, 41, 42, 106 and 28. The original alley abutted original Lots 9, 13-15, 17-18, Square 192 which were assigned to the public "to be sold agreeably to the deeds of trust concerning lands in the said City" under the initial division of the square on November 6, 1798 from the lands of Sam Blodget and Robert Peter, original proprietors. The original lots and the apportioned alley area for each of said lots was in turn sold and conveyed by the Commissioners as indicated on the Disposal of Public Lots documents. These lots were conveyed out by the Commissioners on May 31, 1852, Liber JAS 41, folio 229 (new), to Joshua Pearce "subject to terms and conditions declared by the President . . . to have and to hold the said ten lots of ground with their privileges and appurtenances to him his heirs and assigns forever."

(c) The portion of the original alley closed in Square 457 (Herman and Bernstein) abutted and was appurtenant to Lots 833, 847, 848, 834, 835, 836 and 38. The original alley abutted original Lots 19, 20, 22, 23 and 24. Under the initial division of Square 457 on October 4, 1792, Lots 22 and 23 remanded with David Barnes, the original proprietor of the square. Said properties were in turn purchased by other purchasers for value. Original Lots 19, 20 and 24 were assigned to the public

"to be sold agreeably to the deeds of trust concerning lands in the said City" from the land of David Barnes, original proprietor, on October 4, 1792. The original lots and the apportioned alley area for each of said lots was in turn sold and conveyed by the Commissioners as indicated in the Disposal of Public Lots documents.

More specifically, Lots 19 and 20 were advertised for public sale at auction, August 30, 1802, and sold to Alexander Kerr (Sen. Doc. No. 653, p. 37, places date of sale on August 31, 1802). Superintendent Thomas Monroe "doth grant, bargain, sell, alien, release and conform" the lots unto Kerr, his heirs and assigns forever to his and their proper use and behoof forever."

Lot 24 was selected by Morris, Nicholson and Greenleaf and sold by Superintendent Monroe to William Simmons, June 29, 1803 (September 2, 1802 according to Sen. Doc. No. 653, p. 37). Advertised for sale at public auction August 30, 1802 and conveyed to Simmons with same language as in deed for Lots 19 and 20, Square 457.

(d) The portion of the original alley closed in Square 70 (Auger) abutted and was appurtenant to Lots 870, 871, 872, 873, 133, 134 and 135. The original alley abutted original Lots 6 and 7. Under the initial division of the Square on October 1, 1796 Lot 6 remained in the ownership of Morris and Nicholson as original proprietors. Original Lot 7 was deeded Liber WB-120, folio 286 (new), "William Noland, Commissioner of Public Buildings 'doth bargain and sell,' August 1, 1845, to Thomas Corcoran —all lots designated (including Lot 7)' . . . to have and to hold said lots with their privileges and appurtenances to him the said Thomas Corcoran his heirs and assigns forever'."

The portion of the original alley closed in Square 51 (Auger) abutted and was appurtenant to Lot 870. The original alley abutted Lots 9, 10, 12 and 13. Under the

initial division of the Square on July 27, 1796, these Lots remained in the ownership of the original proprietor, Robert Peter.

(e) The portion of the original alley closed in Square 100 (Bicentennial Associates) abutted and was appurtenant to Lots 113 and 879. The original alley abutted original Lots 17, 18, 20, 21. Original Lots 17, 20, and 21 were assigned to the public "to be sold agreeably to the Deeds of Trust concerning the lands in the said City" from the lands of the original proprietor, James M. Lingan, pursuant to a division made on October 5, 1792. Original Lots 17, 20 and 21 and the apportioned alley area for each of said lots was in turn sold and conveyed by the Commissioners as indicated in the Disposal of Public Lots. These lots and the apportioned alley area for each of said lots were in turn sold to John Picherell in fee simple, who purchased them from the Commissioner of Public Buildings on January 11, 1830 "subject to the terms and conditions declared by the Pres. of the U.S. for regulating the materials and manner of buildings and improvements." This deed was recorded in Liber WB-28, Folio 246 (new).

Original Lot 18, Square 100, under the initial division of Square 100 on October 5, 1792, remained in the ownership of the original proprietor, James M. Lingan.

(f) The portion of the original alley area closed in Square 106 (Washington Medical Center, abutted and was appurtenant to Lots 849, 848, 838, 837, 827, 825, 844 and 42. The original alley abutted original Lots 3-8, 13-15, 17-22 and 28. On October 17, 1791, the square, whose sole proprietor had been James M. Lingan, was initially divided in the following way pertinent to this closing:

> Lots Nos. 6, 7, 8, 13, 21 and 22 were to remain to the said James M. Lingan.

> Lots Nos. 3, 4, 5, 14, 15, 17, 18, 19 and 20 were assigned to the public "to be sold agreeably to the Deeds of Trust concerning lands in the said City."

More specifically, under the disposal of public lots Lot 3, Square 106, was purchased in fee simple (Liber G-7 (A), folio 10 (new) from the Commissioners of the City of Washington by Absalom Joy, March 25, 1801 (February 25, 1801 according to Senate Doc. No. 653, p. 19) "subject to terms and conditions declared by the President. . . ." Note: At the end of the certificate is the following:

"Lot No. 3 in Square 106 contains	4168 sq. ft.
proportion of alley	488 sq. ft.
	4656 sq. ft."

Lots 4 and 5, Square 106, were purchased in fee simple (Liber T-19, folio 252 (new) from Superintendent Thomas Monroe "subject to terms and conditions declared by the President . . ." by William Morgan, Issac Briggs, Gerald Brooke and Samuel Lukens as trustees and for the use of the religious Society of Friends on March 24, 1808.

Lot 14, Square 106, sold to John Sioufsa on November 11, 1811 per Senate Doc. No. 653, p. 19 (believed to be recorded in Liber A-B-27, folio 350 (old) (could not locate liber).

Lot 18 purchased in fee simple (Liber A-Q-41, folio 153) June 22, 1815 (June 20, 1815 according to Sen. Doc. No. 653, p. 19) by John Freeman "subject to terms and conditions declared by the President . . . ."

Lot 19, by virtue of "An Act of Congress granting certain city lots to the Corporation of the Columbian College for the purposes therein mentioned" (Act of July 14, 1832, 22d Cong., 1st Sess.) assigned, in fee simple, to the trustees of that college by Joseph Elgar, Commissioner of Public Buildings, on February 1, 1833 (not recorded in

Sen. Doc. No. 653) recorded by deed in Liber WB-50, folio 20 (new).

Lot 20 purchased April 21, 1852 (April 28, 1852 in Sen. Doc. No. 653, p. 19) from William Easby, Commissioner of Public Buildings by William B. Todd "subject to the terms and conditions declared by the President . . ." Easby "doth bargain and sell" lot to Todd "to have and to hold the said lot of ground with its privileges and appurtenances to him [Todd] and his heirs and assigns forever." (Liber J.A.S.-39, folio 108 (new)).

Lot 28 purchased from Superintendent Thomas Monroe in fee simple (Liber AC-28, folio 252 (new)) by Toppan Webster on February 27, 1812 (December 4, 1811, according to Sen. Doc. No. 653, p. 19) "subject to the terms and conditions declared by the President . . . ."

13. (a) On March 25, 1975 plaintiff C & P filed its claim for refund in this Court.

(b) On January 5, 1974 plaintiff The Supreme Council filed its claim for refund in this Court.

(c) On April 7, 1975 plaintiffs Herman and Bernstein filed their claim for refund in this Court.

(d) On March 25, 1975 plaintiffs Ulysses and Lulu Auger filed their claim for refund in this Court.

(e) On January 29, 1975 plaintiff Bicentennial Associates filed its claim for refund in this Court.

(f) On March 25, 1975 plaintiff Washington Medical Center, Inc. filed its claim for refund in this Court.

II

It is important to note the historical background of the alleys in the original City of Washington before addressing the merits in these cases. Detailed descriptions of the founding of the Nation's Capital and the laying out of the original squares, lots, streets and alleys are set forth in a number of cases. The most significant being:

Pratt v. *Law*, 13 U.S. (9 Cranch) 456 (1815); *Van Ness* v. *City of Washington*, 29 U.S. (4 Pet.) 232 (1830); *Morris* v. *United States*, 174 U.S. 196 (1898); *Fitzhugh* v. *United States*, 59 App. D.C. 285, 40 F.2d 797 (1930); *United States* v. *Groen*, 72 F. Supp. 713 (D. D.C. 1947); *Brooks* v. *Brooks*, XXVIII Wash. L. Rptr. 335 (D.C. Supp. 1900).

This Court will not set forth yet another statement of that history, rather, it will set forth that history as described in the excellent brief filed by these plaintiffs, which is also quoted in part in *Washington Medical Center, Inc.* v. *United States*, 545 F.2d 116, 122-123 (Ct. Cl. 1976) in which that Court held that title in the original alleys was in the United States. *See* 545 F.2d at 124.[1] That history as set out in the plaintiffs' brief is as follows:

Under the Charter of June 20, 1632 from Charles I, King of England, Cecilius Calvert, the first Lord Proprietary of the Province of Maryland, was granted all lands now embraced within the District of Columbia. After the American Revolution, Maryland became a state and succeeded to all rights of the Lord Proprietary, including the absolute right to the soil for use by the people of the new sovereignty.

The State of Maryland authorized cessation to the United States of the territory which is now the District of Columbia. (Act of December 23, 1788, Maryland Laws 1788, Chapter 46, D.C. Code p. XXX (1973)). By Act of Congress, adopted July 16, 1790 (1 Stat. 130 Ch. 28; D.C. Code p. XXXIII), as amended by Act of Congress approved March 3, 1791 (1 Stat. 214, Ch. 17; D.C. Code p. XXXIV), the cession was accepted and the Presi-

[1] The plaintiffs in that case have filed a Petition for Certiorari with the United States Supreme Court and have recently cited the favorable results in this case in support of their Petition for Rehearing of their Petition for Certiorari.

dent of the United States was authorized to appoint three commissioners whose duty was to "survey, and by proper metes and bounds define and limit" such district or territory. The Act empowered the Commissioners "to purchase or accept such quantity of land on the eastern side of [the Potomac River] for the use of the United States, and according to such plans as the President shall approve." Additionally, the Commissioners were required to provide suitable buildings for the accommodation of public offices prior to the first Monday in December, 1800, at which time the seat of government would be transferred to the federal city.

On January 24, and March 30, 1791, the President by proclamation located and defined the limits of the District of Columbia and appointed the Commissioners who, with their successors, located and laid out the City of Washington. (D.C. Code, p. XXXIV and XXXV (1973)). The general boundaries of the proposed City, now called the "original" City, were the Eastern Branch, the Potomac River, Rock Creek to a point near P Street, N.W. then following what is now Florida Avenue to 15th and H Streets, N.E., then south to C Street, N.E. then east to 20th Street and then south to the Eastern Branch. The land within was devoted mostly to farm purposes owned principally by 19 owners hereinafter sometimes referred to as "original proprietors".

While various maps and plans for the City were being prepared under the direction of the President and the Commissioners, negotiations were entered into between the Commissioners and the original proprietors which resulted in agreements executed by the parties providing for the disposition of the land within the original City pursuant to deeds of trust to be executed.

The Deeds of Trust (see form, Burch's Digest 330-34 (1823)) were executed around June 30, 1791 by the original proprietors and provided for the disposition of the

land within the limits of the City of Washington in three different categories: (1) the fee title to streets was vested in the United States. See *Van Ness* v. *City of Washington, supra*; (2) the land appropriations or reservations for the use of the United States were purchased by the Commissioners with fee title vesting in the United States at the rate of 25 pounds per acre; (3) the entire residue of the land, after being laid out in squares, parcels and lots was to be divided equally with one-half the land conveyed to the original proprietors by the trustees and the other one-half assigned to the Commissioners to be sold upon such terms and condition as the President should deem proper with the proceeds from said sales to be first applied towards the payments due the original proprietors, with the remaining proceeds to the President of the United States to be applied for purposes under the Act of Congress (*e.g.*, construction of new governmental buildings) authorizing the acquisition or acceptance.

On December 19, 1791 the State of Maryland ratified the previous Act of Cession (Maryland Law 1791, Ch. 45; D.C. Code p. XXX) noting that agreements had been entered into between the Commissioners and the original proprietors by the Deeds of Trust previously described also included in the ratification a specific proviso stating "That nothing herein contained shall be construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States. . . ."

There is no mention in any of the agreements or in the Deeds of Trust of title or ownership of the interior alleys. However by regulation of the President dated October 17, 1791, certain building regulations were promulgated and declared to be "the terms and conditions under and upon which conveyances are to be made ac-

cording to the Deeds of Trust of the lands within the City." A section of these regulations provided as follows:

> The way into the square, being designed in a special manner, for the common use and convenience of the occupiers of the respective squares, the property in the same is reserved to the public, so that there may be an immediate interference on any abuse of the use thereof by any individual to the nuisance or obstruction of others. The proprietors of the lots adjoining the entrance into the squares, in arching over the entrance, and fixing gates in the manner the commissioners shall approve, shall be entitled to divide the space over the arching and build it up with the range of that line of the square.

Acting pursuant to the Deeds of Trust, the Trustees, after allocation for streets and public reservations under the other two categories of land utilization, made the division of the residue of the lands by assigning squares and portions there of or lots to the original proprietors and to the Commissioners for subsequent sale to the public. Pursuant to Acts of the assembly of Maryland (December 19, 1791 and December 28, 1793, respectively) the assignments made back to the former owners were deemed completed and sales to the purchasers of the lots by the Commissioners by certification were deemed to be "sufficient and effectual to vest the legal estate in the purchasers . . . without any deed or formal conveyances."

III

The defendants first argue that this case should be dismissed as the result of the failure of the plaintiff to join an indispensable party, namely, the United States. This argument is based on the fact that if the original alleys were owned by the United States then any funds collected from these plaintiffs will be paid into the Treasury of the United States. Conversely, should the Court rule that the alleys are not the property of the United States, then the moneys would be returned to the plaintiffs to the detriment of the United States.

It is important to note, that the moneys paid over by the plaintiffs as set forth in Part I, par. 8, *supra*, have not been paid into the United States Treasury. Those funds are now being held in bank accounts, in escrow, pursuant to an agreement by the parties. Moreover, these cases are suits for injunctive and declaratory relief and challenge the authority of the District of Columbia and the District of Columbia City Council to charge for the alleys as a condition for their being closed by the District of Columbia.

The defendants made a similar argument in *Carr* v. *District of Columbia*, 371 F. Supp. 293 (D. D.C. 1974) which was affirmed without opinion, 172 U.S. App. D.C. 224, 521 F.2d 324 (1975). There the facts were essentially the same as here and the court (Judge Flannery) stated (371 F. Supp. at 296):

> In this action the United States is not an indispensable party within the meaning of Fed. R. Civ. P. 19(b). Plaintiffs here seek a declaratory judgment. The sole issue raised is whether the District of Columbia has authority to charge plaintiffs the fair market value for alley space closed pursuant to The Street Readjustment Act of the District of Columbia, supra. Congress has delegated to the District of Columbia complete authority to close United States alleys. See ¶ 9, *infra*. Therefore, a judgment rendered in the United States' absence would be entirely adequate and would not prejudice United States' interests. More importantly, since the funds at stake in this action have not been deposited into the United States Treasury, but instead have been placed in an escrow account in The Riggs National

> Bank, judgment here for plaintiffs would neither run against nor be satisfied from United States funds. Rather, judgment would simply declare the rights of the parties who represent all the necessary interests in such escrow funds. In addition, no party would be subject to the threat of double liability which would be present had the District of Columbia already received and paid the funds to the United States.

The above reasoning has equal applicability in this case.

Furthermore, a few other factors should be mentioned. Although the United States is not a formal party in this case it has actively participated in and been fully represented at every hearing. An attorney for the United States, and sometimes more than one, attended all proceedings in this case. Even though the arguments and briefs were written and filed in the names of these defendants, counsel for the United States argued on given points of law. This then is not the case where the United States merely reviewed pleadings and observed the proceedings in the courtroom; this is the case where the United States was a very active participant, participating in the writing of pleadings and briefs and at oral argument. Indeed, on one occasion these defendants asked for additional time to file a responsive pleading to the plaintiffs' motions for summary judgment for the reason that "counsel for the defendant was advised by a representative of the Department of Justice that a short additional extension of time was needed in order for *them* to prepare and make copies of the pleading responsive to plaintiffs' motion". (Emphasis this Court's.) There is no doubt that the argument presented to this Court in these cases is the argument of the United States.

On one occasion, it was requested by the plaintiffs that this Court visit the National Archives of the United

States in order to view some of the original documents which form the basis for this Court's decision. This Court agreed to do so and was accompanied by counsel for plaintiffs, counsel for the defendants, and counsel for the United States.

Counsel for the United States always sat at defendants' table during court hearings and did not hesitate to address the Court on any point where he felt that counsel for the defendants had not sufficiently articulated the position of the United States.

Another factor which negates against the alleged indispensability of the United States is the fact that even though the statutes under which these alleys were closed and the charges made had been in existence for many years the defendants never made any charges until 1967. This fact is conceded by the defendants *and* the United States. *See also Carr* v. *District of Columbia*, 371 F. Supp. at 296. It is also conceded by the defendants *and* the United States that the United States did not involve itself in any decision, past or present, to charge or not to charge for the closing of the alleys, that it did not involve itself in the decision to begin charging for the alley closings in 1967, and that it does not involve itself in the decisions as to the amount of the charge for any alley closing or whether any charges should be made at all. It is conceded that the United States does not and has not participated in any manner in any alley closing proceeding of this nature. There is no suggestion that the United States has more recently changed the nature of its participation in these alley closing proceedings. All these facts demonstrate that the United States has no real interest in these proceedings; actually, the position of the United States is not unlike that of an incidental beneficiary.

All of the above facts weigh against any argument that the United States is an indispensable party in these cases

since it has always abided by the defendants' decision concerning whether charges should be made and the amount of such charges. The defendants have always made the final decision whether the United States was to recover any funds whatsoever from the closing of a particular alley and accordingly, this Court concludes that the United States has no real interest in these proceedings, and is therefore not an indispensable party.

Turning to Super. Ct. Civ. R. 19 which governs the joinder of persons needed for adjudication. This Court notes that the United States is not prejudiced by the failure to join in this proceeding since it has completely delegated the authority to collect or not to collect to these defendants. The relief granted here would not remove moneys from the Treasury of the United States since the funds are now in escrow. The issue raised here concerns only the actions of the defendants and not of the United States. Finally, these plaintiffs do not have an adequate remedy if this case is dismissed since they cannot file an action in the United States Court of Claims in view of the fact that the moneys have not been paid into the Treasury of the United States. Taking into consideration all of the above four factors, *see* 3A Moores Federal Practice, Civil 19.07-2 (1977), this Court concludes that this case should not be dismissed for failure to join the United States.

One final point deserves mention and that is, the United States is fully aware of this litigation and has actively participated in every phase of this litigation and could have intervened as a party if it had desired to do so. On the other hand, the plaintiffs may not have been able to join the United States as a party defendant in this case because of the doctrine of sovereign immunity.

After considering all of the above factors, this Court concludes that the United States is not an indispensable party and that these cases should not be dismissed.

IV

Any discussion of the merits must begin with the documents found in the National Archives. This Court, together with counsel, visited the National Archives and viewed many of the original documents which will be referred to in this Opinion. Plaintiffs thereafter provided copies of those documents for the benefit of the Court, counsel and for the record. One volume of those documents is attached to the affidavit of Antoinette J. Lee and her deposition is also a part of the record. Those documents will henceforth be referred to as the "Lee" exhibits. Another set of documents is referred to in the deposition of Elizabeth J. Miller, those documents have also been copied and are a part of the record and will be referred to as the "Miller" exhibits. Both Ms. Lee and Ms. Miller are historians who have conducted considerable research in these cases by reviewing the originals of documents now before the Court. The "Lee" and "Miller" exhibits have all been certified as true and authentic copies of the originals by a representative of the National Archives of the United States.

The record also contains the depositions of Harold T. Pinkett and Dorothy Provine, the former being Chief of the National Resources Branch of the National Archives and Records Services, and the latter being an employee of the National Archives and Records Services who works primarily with various records relating to the District of Columbia. The final deposition which is also a part of the record is that of Ralph E. Ehrenberg who is Director of the Cartographic Archives Division of the National Archives. His deposition was taken on October 18, 1977 and completed on November 9, 1977.

The plaintiffs rely upon testimony set forth in the above affidavits and depositions to support their argument that the above documents are authentic records and the actual

records relating to the subject alleys. Now, apparently unlike their position in the case before the United States Court of Claims, *Washington Medical Center, Inc.* v. *United States*, 545 F.2d at 126, the *United States* has conceded that the documents are authentic. Counsel so advised this Court at oral argument that they do not contest the authenticity of the documents.

This Court is satisfied in any event that the documents are authentic documents and that their authenticity has been established by the depositions and testimony already mentioned. Time does not permit a detailed analysis of the documents, however, a few words on just one set of documents are in order. Some of the important papers before this Court are taken from a document entitled "Register of Squares". Ms. Lee examined the testimony of John Stewart who testified in the case of *Morris* v. *United States, supra*, in the 19th Century. He referred to a volume entitled the Register of Squares and to other relevant documents and described them as authentic documents. (Lee Dep. 13) It was further determined that one Nicholas King was appointed as a surveyor on September 21, 1796 to lay out certain streets of the city and to give gradations. He mentioned his work several times in his manuscript primarily from December 1797 to January 1798. It has been established that he was assisted in his work by his brother Robert King. His papers contain a letter from Robert King to James Rice of Baltimore County (Maryland). In that letter Mr. King requested Mr. Rice to prepare two blank volumes of a certain size, entitled "Register of Squares" and also requested two or three cakes of what he referred to as "Lake Extra" which is a reddish ink. Robert King was associated with Nicholas King in the preparation of the Register of Squares and it is noted those volumes are written in reddish ink. (Lee Dep. 14-16.) Based upon these facts the witness concluded that the Register of Squares examined by the Court were the same as the Register of Squares prepared

by the surveyor Nicholas King. This conclusion is also supported by the testimony of Mr. Ehrenberg who has co-authored some articles on Nicholas King and is familiar with his style and handwriting (Ehrenberg Dep. 9-13). These facts together with all of the other information presented by the witnesses supports the finding that the Register of Squares reviewed by the Court, copies of which are in evidence in this case and relied upon by this Court are authentic documents. The same can be said for the other documents which are a part of the record in this case—a fact now conceded by both defendants and the United States.

V

Without identifying each and every document which is in evidence, some reference should be made to the more important documents and their significance respecting the merits of this case. It must be kept in mind that the defendants contend that the original alleys were owned by the United States and based on that contention they now seek to charge for the alley closings. The plaintiffs, on the other hand, argue that the United States never had title in the alleys. The latter argument is borne out by the documents filed in this case.

The original Deeds of Trust between the original proprietors and the trustees were entered into beginning in 1791. One such Deed of Trust has been filed in this case, however, it is dated 1793 (Lee Ex. C-1). The language of the earlier and later documents are conceded to be similar. These documents are important because they set forth the exact terms and conditions under which the property was conveyed to the trustees. They establish that the original proprietors conveyed to the trustees with the understanding that one-half of the *quantity* conveyed would be returned to the original proprietors but not necessarily the same property. The remaining portion

was for the use of the United States and the public, the latter to be sold by the Commissioners to members of the public who wished to purchase land in the City of Washington. The Deeds of Trust also refer to the sale by the United States as being "under such terms and conditions as the President of the United States, for the time being, shall direct". More importantly, the Deeds of Trust provide that the "convenances to the purchasers shall be on and subject to such terms and conditions as shall be thought reasonable by the President, for the time being, for *regulating the terms and manner of the buildings and improvements on the lots generally*". (Emphasis this Court's.) In the opinion of this Court, the last reference is merely a direction that the President may establish what would today be referred to as a building code. (See Deed of Trust, Lee Ex. C-1.) That direction was carried out by the President when he wrote the regulations dated October 17, 1791. These regulations are also referred to in *Washington Medical Center, Inc.* v. *United States*, 545 F.2d at 124, 125, and will be discussed at a later point in this Opinion.

The Commissioners divided the squares equally by assigning one-half of the lots back to the original proprietors and one-half of the lots for the use of the public. (Lee Ex. D-1 thru D-25.)

The Register of Squares also sets forth the division between the original proprietors and the public. The volume contains one page for each square and the top of each page contains a drawing of the square showing its breakdown into numbered lots and the subject alleys. It is significant at this point that the bottom of the page again sets forth the division of the lots—approximately one-half of the lots and one-half of the square footage being assigned to the original proprietors and the other half of the lots and square

footage being set aside for sale to the public. (Lee Exs. E-4 thru E-7.) The latter are the lots which were thereafter sold to various purchasers and speculators. It is again significant that each of the pages gives a detailed breakdown not only of the square footage of the lots but the square footage of the adjoining portion of the alley. Such a breakdown showing a portion of the alley in relation to the lots is inconsistent with the theory that the alleys were owned by the United States. The portion which was reserved for the public has the same breakdown of square footage for lot and alley. The Register of Squares goes on to list when the property was sold and "to whom sold".

The next documents of interest are referred to as "Disposal of Public Lots" (Lee Ex. F-1 thru F-6). These documents also contain a record of the sale of public lands and have columns headed "Square", "Lot", "Square Feet in Lots", "Proportion of Alley", "When Sold or Selected", "To Whom Sold", "When Conveyed", and "When Entry of Transaction is Made". The significance of this set of documents is that they also contain a breakdown of the square footage of the alleys. These documents are consistent with and contain the same entries as those found in the Register of Squares. The fact that it refers to the sale of the lots and to the *proportion of the alley* certainly suggests that the alleys were included in the sale, a fact which if true in inconsistent with the argument that title to the alleys was in the United States.

The following documents refer to various sales of the lots to purchasers and speculators and shows the amount paid for some of the lots. (Lee Ex. G thru R.) Almost all of the documents dated prior to 1815 have a breakdown of property sold into the area of lot and the area of the proportion of the alley adjoining that lot. The entries found in these documents are consistent with those found in the Register of Squares and the Disposal of Public Land record (Lee Ex. G-1 thru G-7).

Some of the documents do not give a breakdown of the area of the alley but the figure listed under the column headed "Contents in Square Feet" include the total area of lot *and* alley. One such example can be found in Square 107, Lot 2. The Register of Squares sets out the square footage of the lot as 2,685 and the alley as 159½, the total of the two being 2,844½ square feet. The lot was sold to Morris and Nicholson (Lee Ex. 4.). The Disposal of Public Land document gives the same breakdown (Lee Ex. F-3) as does an account book (Lee Ex. G-3). The same lot was involved in what is apparently yet another transaction referred to in the same book showing the square footage as 2,844 and the sales price of $66.00. (Lee Ex. G-8.) The 2,844 square foot figure is exactly one-half square foot less than the total square footage for the lot and alley. This record thus suggests that the sale of the lot included not only the lot but a proportion of the alley and again is inconsistent with the claim that the alleys were the property of the United States.

The page of the Division of Squares volume reveals that each square was divided equally between original proprietors and the public a further suggestion there was no reservation of a fee in the alleys by the United States. (Lee Ex. N-1 thru N-4.) It would seem that if the United States had a fee in the alley that the square footage of the alley would have been deducted from the square footage of the total square but such was not the case.

Without further elaboration on these points it is sufficient to note that the treatment of the alleys in the sales dating back to the original Deeds of Trust is consistent with the argument that the alleys were sold to the public and were not thereafter held in fee by the United States.

VI

Not only do the records just discussed reveal that the record keepers were careful to list the area of the proportion of the alleys as well as that of the lots, those records contained at least a suggestion that the purchasers paid for "their" proportion of the alleys as well as for the lots.

Direct evidence of payment for lot and alley can be found in two documents in which there is a breakdown of the square footage of the property and the price paid. (Lee Ex. R-1.) The square involved in Square 76, Lots 1-3, 8-12, 9-22 and 28-30. The total square footage for the above lots was 59,129 and that of the proportion of the alleys adjoining the lots, 5,900 for a total of 65,-029 square feet. The record notes that the above land was sold at $80 per "standard lot", a standard lot being 5,265 square feet. The record further reveals that the amount paid for the above land was $988. One can arrive at the same figure by simply dividing the total land area including the lot and proportion of alley which is 65,029 square feet by the standard lot of 5,265 square feet and multiplying the resulting figure by $80.00. Simple arithmetic reveals then that the purchaser paid for both lot and alley. The same calculation can be performed for a different square and lots with the same result. (See Lee Ex. R-2.)

This point can be further illustrated by reference to Journal Volume 3, page 328 (Miller Ex. Q) which contains the entry that Absalom Joy purchased Lot 3 in Square 106 for $0.08 per square foot and paid a total of $372.48. The Journal Volume does not set forth the square footage of the lot. However, this figure can be determined by referring to the Register of Squares for the same lot which lists the property as being sold but does not indicate to whom it was sold. The lot area is listed as

4,168 square feet and the proportion of the alley adjoining the lot is listed as 488 square feet for a total of 4,656 square feet for both lot and alley. (Miller Ex. C-5.) That figure multiplied by the $0.08 per square foot paid by Absalom Joy equals the $372.48 which was actually paid by Joy. Further proof that the very lot was sold to Joy is found in the Disposal of Public Lots document (Miller Ex. D-5) which lists the sale of the same land to Joy on March 25, 1801.

Although the plaintiffs were unable to present documents which give a breakdown of the price per square foot or for a standard lot paid for the other land involved in these cases, since such information could not be located, the above still presents a further suggestion that the Commissioners charged for both lots and a proportion of the alleys when selling the public lots. It seems inconceivable that the Commissioners would have charged for a proportion of the alleys if title to those alleys had been retained or reserved by the United States.

VII

As pointed out above, the Commissioners sold public lots to the public and charged for both lots and alleys. This is evidence that the Commissioners considered the alleys as a part of the lots, as did the purchasers of the property. This is made particularly clear in the case of Absalom Joy. Further evidence of the intent of the Commissioners is found in their reply to a letter addressed to them by one John Nicholson dated September 6, 1796, while George Washington was still the President. Mr. Nicholson had apparently questioned one or more of the Commissioners concerning his right to close the alleys in his square and thereafter wrote them in order to obtain a written confirmation of their advice to him. His letter and their reply are preserved in the National Archives. Mr. Nicholson wrote as follows (Lee Ex. V-1):

"Gentlemen:

It will be a satisfaction to me to have you a line expressive of the opinion you this date gave verbally that the owner of whole square in the City of Washington may shut the alleys as laid out by you and recorded—and otherwise lay out the same square at their pleasure into lots.

I am the more desirous of this point as some of our houses are already built on ground you laid out for alleys—in square wholly our own—we having laid out the same square differently.

Yours respectfully,

The Commissioners of
the City of Washington

Jno. Nicholson
Sep. 6th, 1796"

The reply from the Commissioners is set out in Entry No. 494, pp. 188 and 189 of the Records of the Office of Public Buildings and Grants dated September 7, 1796, and states (Lee Ex. V-2):

7th Sept. 1796

494 Lin. Commissioner's Office

The alleys within the Squares not having been directed by the President, or conveyed by the original proprietors for public use, but on the contrary, being paid for by the purchasers of the Squares, we are of the opinion, that where the whole Square belongs to one person, or to several persons, who will all concur in the measure, that those alleys may be shut up, or otherwise, as appropriated as the proprietor or proprietors judge most for their advantage—We are, with respect,

G. Scott
W. Thornton
A. White

John Nicholson, Esq.

The Commissioners noted that the purchasers paid for the alleys and that when the square is owned by one persons or by several persons who concur, the alleys may be closed. Their conclusion is inconsistent with the theory that title in the alleys was in the United States.

One further document touching upon the state of mind of the Commissioners at or about this time is a set of interrogatories addressed to the Clerk of the Commissioners of the City of Washington in preparation of the case of *Pratt* v. *Law*, *supra*, which was decided in 1815. The relevant interrogatory which is No. 11 and the answer thereto is as follows: (Lee Ex. U-1.)

> 11th Interrogatory—In the answer you have given * * * to fifteen additional Interrogatory have you not included in the statement of square feet given by you; the proportion of square feet contained in public alleys as calculated & applied to lots by the Commissioners.
>
> Answer—Yea.

The answer by the Secretary to the Commissioners, City of Washington is yet further evidence that the Commissioners conveyed both lot and alley to purchasers.

VIII

The defendants and the United States nave presented no evidence which is contrary to those documents already discussed. While it is true that an earlier trial court was of the opinion that there was a lack of evidence to prove that the Register of Squares were contemporaneous and original books, a fact noted by the Supreme Court in *Morris* v. *United States*, 174 U.S. at 277, that defect has been overcome in this case. The testimony of Mr. Ehrenberg of the National Archives is that the documents were prepared by Nicholas King and his

brother Robert King. Nicholas King worked as a surveyor for the City of Washington from 1796 to 1797 and from 1803 to 1812. There is no statement as to his duties during his first term but during his second term his duties included surveying plots, certifying and recording the subdivisions of squares and lots and fixing the building lines. Since he held the same employment between 1796 and 1797, we can assume that his duties were the same. (Ehrenberg Dep. 115.)

Further proof that the documents are originals is that they are referred to in the detailed "Inventory of Books Plans Instruments belonging to the Public in the Surveyors Office" dated May 31, 1802 signed by Robert King. (Miller Ex. W.) The other documents referred to in this opinion are also described in that inventory.

When one compares all of the documents presented in these cases and notes the relationship between those documents, as for example between the Register of Squares, the Disposal of Public Lands, the Journal volumes and the other materials, it must be concluded that the documents are entitled to great weight and *are* the original documents. As noted in Part IV, *supra* it was Robert King who ordered the preparation of those volumes titled Register of Squares and the ink known as "Lake Extra" which is a reddish ink. The volumes found in the National Archives were entitled Register of Squares and were written in a reddish ink. This Court is also satisfied that those volumes were written in the style and hand of Nicholas King. The relationship between the various documents has been briefly illustrated by the case of Absalom Joy. (See Part VI, *supra*.) Although this Court did not take the time to trace each and every document in this opinion, it has reviewed those documents, traced them and is fully satisfied that they are all interrelated. This fact alone would establish the authenticity of those documents as well as their reliability.

Finally, as to the weight to be given to these records, the defendants as noted above have presented no other evidence on these points nor have they or the United States really contested that the documents are the original documents and, in fact, they have conceded that the documents are authentic.

IX

The defendants and the United States argue that, notwithstanding the above evidence, the determination as to the ownership of the original alleys can be based entirely on the Regulations signed by President Washington on October 17, 1791. (Lee Exs. W-1 and W-2.) While it is true that it is necessary to look to the documents which purport to assign, convey, reserve or retain title, the significance of the evidence just discussed is that they reveal a pattern of disposal of the lands which was accomplished contemporaneously with the time President Washington issued his Regulations. That pattern was to treat the alleys as being sold, and indeed, to charge for them. It seems unlikely that such action would have been taken, especially where some land owners raised specific questions concerning the status of the alleys, see Part VII, *supra*, unless there was a clear understanding that the alleys were not the property of the United States.

The Regulations issued by President Washington on October 17, 1791, are as follows:

> 17 October 1791
>
> The President pursuant to the Deeds in Trust published the following Terms and Conditions of Improvements in the City of Washington.
>
> Terms and Conditions, declared by the President of the United States this seventeenth day of October seventeen hundred and ninety-one, for regulating the

> materials and manner of Buildings and Improvements on the Lots in the City of Washington.
>
> 1st That the outer and party walls of all houses within the said City shall be built of Brick or Stone.
>
> 2nd That all buildings on the streets shall be parallel thereto and may be advanced to the Line of the Street, or withdrawn therefrom at the pleasure of the Improver: But where any such building is about to be erected, neither the foundation or party wall shall be begun, without first applying to the person or persons appointed by the Commissioners to superintend the buildings within the City, who will ascertain the lines and the walls to correspond with these regulations.
>
> 3rd The wall of no house to be higher than forty feet to the roof in any part of the City, nor shall any be lower than thirty five feet on any of the Avenues.
>
> 4th That the person or persons appointed by the Commissioners to superintend the buildings may enter on the land of any person to set out the foundations and regulate the walls to be built between party and party as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built and shall be of the breadth and thickness determined by such person, proper. And the first builder shall be reimbursed one moiety of the charge of such party wall, or so much thereof as the next builder shall any ways use or break into the said wall. The charge or value thereof to be set by the person or persons appointed by the Commissioners.
>
> 5th As temporary conveniences will be proper for lodging workmen and securing materials for build-

ing, it is to be understood that such may be erected with the approbation of the Commissioners, but they may be removed and discontinued by the special order of the Commissioners.

6th The way into the squares being designed in a special manner for the common use and convenience of the occupiers of the respective squares, the property in the same is reserved to the public, so that there may be an immediate interference on any abuse of the use thereof by any individual to the nuisance or obstruction of others. The proprietors of the Lots adjoining the entrance into the squares, on arching over the Entrance and fixing gates in the manner the Commissioners shall approve shall be entitled to divide the space over the arching and build it up with the range of that line of the square.

7th No vaults shall be permitted under the streets the streets nor any encroachments on the foot way above by stoops, porches, cellar doors, windows, ditches or leaning walls, nor shall there be any projection over the streets, other than the eves of the house without the consent of the Commissioners.

8th These regulations are the terms and conditions under and upon which conveyances are to be made according to the deeds in Trust of the Lands within the City.

Geo Washington

Agreeably to the President's order for the sale of lots, the Commissioners published the following: Terms of Sales of Lots in the City of Washington this 17th day of October 1791.

All the lands purchased at this sale are to be subject to the terms and conditions declared by the President pursuant to the Deed in Trust. The purchaser is immediately to pay one-fourth part of the purchase.

The origin of the Regulations can be traced directly to the Deeds of Trust. (See for example, Lee Ex. C-1.) That document was briefly described in Part V, *supra*.

Under the Deeds of Trust, the original proprietors conveyed their lands to the trustees. The deeds provided that the President could direct that the land be laid out for the federal city into squares, parcels and lots as the President might approve. The trustees would then convey to the Commissioners who would convey one-half of the quantity back to the original proprietors, after setting aside one-half for the use of the public. It is recognized in the document that the original proprietors might not receive the same land back so there was a provision to convey to them a like quantity of land or money in lieu thereof. The land which was not specifically set aside for use by the United States or not returned to the original proprietors was known as the public lands and was to be "sold at such time, or times, in such manner, and on such terms and conditions as the President might direct." [2]

The deed then provides that:

> But the said conveyances to the purchasers shall be on and subject to such terms, and conditions, as shall be thought reasonable by the President, for the time being, for regulating the materials and manner of the buildings, and improvements on the lots generally, in the said city, or in particular streets, or parts thereof, for common convenience, safety, and order
> * * *

[2] Actually, of the land deeded to the trustees, a portion was conveyed to the United States at the rate of 25 pounds per acre for the use of the United States (President's Square, Judiciary Square) and the *residue* was divided equally, one-half to the original proprietors and one-half for sale to the public.

It is obvious that this section of the Deeds authorizes the President to promulgate building regulations, keeping in mind that the conveyances from the original proprietors was for the establishment and erection of a new city.

The language of the Regulations is consistent with that of the Deeds. First, it provided that the regulations were being promulgated "pursuant to the Deeds in Trust" and that the Regulations set the "Terms and Conditions of Improvements in the City of Washington". The language in the next paragraph tracks the language of the Deeds in providing that the "terms and conditions" are declared "for regulating the materials and manner of buildings and improvements on the lots in the City of Washington". Clearly the Regulations refer directly to that provision of the Deeds authorizing the President to establish building codes or regulations.

The specific language of the regulations themselves are also significant since the context is typical of building codes. They provide that the outer and party walls shall be constructed of brick or stone, that all buildings shall be parallel to the streets but may be on the street or back from the street provided however that before beginning construction the builders must apply for a permit. The regulations set the height limit of buildings and provides for building inspectors. The above are all set out in the first four regulations. The fifth regulation provides for the temporary lodging of workmen and placement of material on the lots on conditions that the material must be removed by special order of the Commissioners. By this it is assumed that the Commissioners and the President sought to avoid any public nuisances.

The sixth regulation is the one on which these defendants and the United States rely in their claim that the United States held title to the alleys. All parties agree that the term "way into the squares" refers to the alleys.

The defendants argue that the phrase "the property in the same is reserved to the public" means that title is reserved to the United States. That argument is consistent with the holding in *Washington Medical Center, Inc.* v. *United States, supra.* That holding by the Court of Claims, although not binding on this court, is entitled to great weight. However, that court did not have the benefit of the documents and other evidence now before this Court.

This Court interprets the Regulations as, not giving or reserving to the United States a fee, but rather, only as a building regulation providing for, at most, an easement for the use and benefit of the lot owners. The interpretation is based upon several factors.

First, there is no indication in the Deeds of Trust that there was to be a reservation of title to the alleys.

Second, it seems unlikely that such an important reservation of a fee would be buried within what is obviously a simple building code. The regulation is one of eight regulations and is numbered six. It occupies no particular place of prominence in the Regulations. It is preceded by regulations which concern the establishment of a building inspection procedure, the height of housing, the construction of party walls and foundations, and the lodging of workers and the storage of building materials.

Third, the regulation does not refer to a fee interest or title in the United States, yet it is based upon documents (Deeds of Trust) which are carefully drawn and worded and which spell out in detail the rights of the signatories. Several times throughout the Deeds of Trust there is refence to the granting or the conveyance of fee simple interests. Since the Regulations track the language of the Deeds of Trust, it would seem that such an important paragraph in the Regulations would have carefully spelled out the rights of the property owners by adopting the

language of the Deeds of Trust. The defendants argue that it is significant that the Regulations refer to "property" which they seek to interpret as synonymous with title or ownership, however, after reviewing the Deeds and the Regulations this Court concludes that the failure of the Regulations to refer directly to a fee or ownership or title was deliberate; simply said, there was no intent to reserve ownership in the alleys.

Fourth, the defendants have made no showing that the United States ever had a fee interest in the square or the alleys upon which they could reserve title. The original proprietors conveyed their interest to the trustees, in trust, to have and to hold pending the directions by the President. The land was laid out in squares, lots and parcels. The President then requested the trustees to convey the streets and specific squares for the use of the United States. (Lee Ex. E-1 and E-2.) There is no evidence that the United States ever paid for the alleys. The squares conveyed for the use of the United States are briefly described in "A statement of the quantity of land appropriated to the use of the United States in the City of Washington". (Lee Ex. E-3.) Neither of the above documents refers to the alleys and there is no showing that any other land was conveyed to the United States at that time. The land which was conveyed to the United States and which is referred to above included such property as the Judiciary Square, the President's Square, the Capital Square, the Center Market, the National Church Square, and so forth. The remainder of the land was still held in trust by the trustees who conveyed it to the Commissioners who then returned a one-half quantity to the original proprietors, pursuant to the Deeds of Trust, and set aside the remainder for sale to the public. It is these two final categories which are of concern here and as can be seen, there was never a conveyance of title in those lands to the United States. The conveyance was to the trustees and thereafter to the Commissioners before the land was

sold at public auction. Since the United States never held title to that land, the President could not have reserved title in the alleys. This is consistent with this Court's interpretation of the Regulations, that the Regulations are a building code which set out an easement for the common benefit of the land owners adjoining the alleys.

Fifth, the Regulations were promulgated pursuant to that section of the Deed of Trust authorizing the President to establish "terms and conditions for regulating the materials and manner of buildings and improvements on the lots in the City of Washington". The President, in his Regulations, uses the same language and states within the Regulations that they are to establish the manner of building lings and improvements in the new city. He then goes on to do just that in his Regulations. That is the specific language of the Deeds of Trust and that specific language is carried over to the building regulations.

Based upon the above interpretations, this Court concludes that title to the contested alleys was never in the United States and that the United States is therefore not entitled either directly or through the District of Columbia to charge a fee based upon depreciated value or the fair market value of the lands consisting of the alleys. In view of the above, the plaintiffs are now entitled to receive back those funds which have been paid into escrow.

X

Although some past court opinions have suggested that title to the alley was in the United States, those opinions were rendered at a time when the issue had not been raised and all parties had assumed that title was in the United States or at a time when the original documents were not before the court or the court did not have an opportunity to consider those documents.

Here, there are no genuine issues of material fact and both sides have moved for summary judgment. It has been conceded by the defendants and the United States that the documents forming the basis of this Court's opinion are authentic and original documents, and this Court is satisfied based upon its own observation of the documents and the testimony submitted in these proceedings that the documents are indeed authentic and original and were made contemporaneously with the transactions they reflect. After considering the history of the Federal City, the history of the squares, lots and creation of the alleys, the Deeds of Trust and the Regulations together with the actual practice of the Commissioners in selling lots to members of the public, this Court concludes that title to the alleys was not in the United States.

To summarize, this decision is based upon the fact that the United States never had title, that the Deeds of Trust did not provide for the United States having or retaining title, that the Regulations signed by President Washington on October 17, 1791 were made pursuant to the Deeds of Trust and were no more than building regulations setting forth an easement for the benefit of lot owners, that in preparing the Register of Squares and other documents pertaining to the squares and lots, the proportion of the alleys was always treated as a part of the lot, that in fact the Commissioners actually put up for sale and sold to the public not only the lots but the respective proportion of alleys and that the statements of the Commissioners, made contemporaneously with these events, reveal that the Commissioners intended to sell, not only the lots but the proportion of the alleys as well.

It should be noted briefly that the United States has not always taken the position that title to the alleys was in the United States, indeed, in a brief filed in preparation of the case of *Fitzhugh* v. *United States*, *supra*, there is a suggestion by the Government that title to the alleys was not in the United States.

In view of all of the above factors this Court enters summary judgment for the plaintiffs.

ORDER

It is hereby

ORDERED that the defendants' motion for summary judgment and to dismiss is denied, and it is further

ORDERED that the plaintiffs' motion for summary judgment is granted, and it is further

ORDERED that the plaintiffs shall submit a proposed order consistent with this Opinion and Order, said proposed order to be submitted within fifteen days of the date of this order.

Dated: March 28, 1978

/s/ John Garrett Penn
JOHN GARRETT PENN
Judge

COPIES TO:
Whayne S. Quin, Esq.
Glenn D. Simpson, Esq.
Attorneys for Plaintiffs

George T. Masson, Jr., Esq.
Attorney for Defendants

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-445

OLIVER T. CARR, JR., ET AL.,
Plaintiffs,

v.

DISTRICT OF COLUMBIA, ET AL.,
Defendants.

MEMORANDUM

This matter comes before the court on the plaintiffs' motion for summary judgment and the opposition thereto. The United States has filed a motion for leave to intervene as a party defendant, and a summary judgment motion. The dispute stems from litigation concerning the closing of "original alleys" within the District of Columbia and efforts by the defendants to force the plaintiffs to pay the fair market value of the alleys closed.

Procedural Background

In a previous action this court held that the District of Columbia has the authority to charge plaintiffs, who own the property abutting the closed alley involved in this case,[1] the fair market value of the space which reverted to plaintiffs' possession, where the alley was owned by the

[1] The alley in question ran parallel to M Street, N.W., in Square 140. It consisted of approximately 3,270 square feet and abutted Lots 875, 883, 24, 839, 882, and 84. It was closed on June 6, 1972 by resolution of the D.C. Council, contingent on the payment of $196,200.00 to the D.C. Treasury. When the present plaintiffs disputed the power of the D.C. Government to compel payment, the money was deposited in escrow in the Riggs Bank.

United States. *Carr* v. *District of Columbia*, 371 F. Supp. 293 (D.D.C. 1974); *aff'd without opinion*, 521 F.2d 324 (D.C. Cir. 1975), *modified*, 543 F.2d 917 (D.C. Cir. 1976). That decision, however, was predicated on a stipulation that the alley in question was in fact owned by the United States. On appeal from the decision of this court, the plaintiff raised for the first time the factual question whether the United States actually held title to the original alleys. The Court of Appeals refused to consider this question because of the lack of an underlying record. *Carr* v. *District of Columbia*, 543 F.2d 917 924 (D.C. Cir. 1976). The Court of Appeals then noted that the one-year time limitation for a motion for relief from judgment pursuant to Rule 60(b), Federal Rules of Civil Procedure, had passed, barring that remedy. The court noted, however, that Rule 60(b) "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . . ." *Id.* at 926, *quoting* F.R.C.P. 56. In modifying its previous affirmance, the court explicitly left open the possibility of an independent action by plaintiffs on the question of ownership of the alleys. 543 F.2d at 929.

The plaintiffs promptly filed a complaint for declaratory judgment on the issue of ownership. The defendants responded with an answer and a motion for summary judgment. On December 22, 1977, this court held that this action is an independent action for relief from judgment, and therefore it must meet the substantive requirements of Rule 60(b). After consideration of the arguments of the parties and the unique circumstances of this case,[2] the court ruled that (1) there was an excusable

[2] It appeared to the court that the newly-discovered records were not in a "normal" location because they were in the national Archives, rather than in the District of Columbia's land records. Moreover, plaintiffs had diligently searched all available D.C. records, and had relied upon the representations of the District's Surveyor and the Corporation Counsel's Office that the United States did indeed own the alleys.

mistake of fact in the original action, and (2) there was newly-discovered evidence that was not available in the first action and the unavailability was not due to a lack of diligence on plaintiffs' part. The court, therefore, denied the defendants' motion for summary judgment. At the same time, however, the court stayed all proceedings in this action pending a decision in a similar case by Judge Penn in the Superior Court of the District of Columbia.

On March 28, 1978, Judge Penn issued an opinion in favor of the plaintiffs in six related cases dealing with the precise issue involved in this case. In summarizing his decision that the United States of America did not own fee simple title to the "original alleys" within the District of Columbia, Judge Penn stated:

> To summarize, this decision is based upon the fact that the United States never had title, that the deeds of trust did not provide for the United States having or regaining title, that the Regulations signed by President Washington on September 17, 1791 were made pursuant to the Deeds of Trust and were no more than building regulations setting forth an easement for the benefit of lot owners, that in preparing the Register of Squares and other documents pertaining to the lots and squares, the proportion of the alleys was always treated as a part of the lot, that in fact the Commissioners actually put up for sale and sold to the public not only the lots but the respective proportion of alleys and that the statements of the Commissioners, made contemporaneously with these events, reveal that the Commissioners intended to sell, not only the lots but the proportion of the alleys as well.

Chesapeake and Potomac Telephone Co. v. *District of Columbia*, CA No. 2671-75 (March 28, 1978), at 47-48.

This court then reopened proceedings in this case and directed the parties to prepare motions for summary judgment on the collateral estoppel effects of the Superior Court judgment. A hearing was to be held on June 16, 1978; however, the United States requested that the matter be held in abeyance while the United States prepared a motion to intervene[3] and a motion for summary judgment. In due course these papers were filed, and the matter is appropriately before the court for summary judgment. The court will enter judgment for the plaintiffs.

Discussion

A. Remaining 60(b) issues.

Some ambiguity appears to exist concerning the appropriateness of this action under Rule 60(b). In the Opinion of December 22, 1977, denying the defendants' motion for summary judgment, the court stated that it "will hear plaintiffs' new evidence to determine whether 60(b) relief is warranted because (1) there was excusable mistake of fact in the original action and (2) there is newly-discovered evidence that was not available in the first action and the unavailability was not due to a lack of diligence on plaintiffs' part." Although this finding seems clear enough, the language that the court "will hear" the evidence has given rise to a dispute over the continuing existence of a 60(b) issue.

The court holds that this action is appropriate. It is clear from the record that relief is warranted because of an excusable mistake of fact and newly-discovered evidence. As the court noted in its earlier opinion, this case involves unique circumstances. Plaintiffs diligently searched the available District of Columbia records and justifiably relied on the assertions of the defendants' rep-

[3] This motion was unopposed and will be granted.

resentatives. It was only through extensive and prolonged historical research that the relevant ancient documents were located in the National Archives.

B. *Effect of Judge Penn's Decision.*

The plaintiffs believe that the Superior Court decision should be given collateral estoppel effect because the District of Columbia was the primary defendant in both cases, the legal and factual issues are the same, and the defendants have had ample opportunity to litigate all aspects of the case. Judge Bryant of this court recently set forth the elements of collateral estoppel:

> (1) the facts sought to be foreclosed from relitigation must be the same as those involved in the prior action;
>
> (2) those facts must have been fully litigated, affording the party against whom they are now offered a full and fair opportuntiy to contest the facts;
>
> (3) the facts subject to the estoppel must have been judicially determined and must have been material to and in support of the holding.
>
> (4) Finally, the party against whom the estoppel is offered must be the same party or in privity with the party against whom the original determination was rendered.

Inmates, D.C. Jail v. *Jackson*, 415 F. Supp. 119, 120 (D.D.C. 1976). The first three requirements are unquestionably met. Regarding the final requirement, strict mutuality of parties should not be required in order to have Judge Penn's decision bind the parties in this case. The older view of collateral estoppel, requiring mutuality of all parties in an action, has been giving way to an approach that allows application of the doctrine if the party *against whom the estoppel is asserted* has had a full and fair

opportunity to litigate the facts. *See Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320-37 (1971); *Inmates, D.C. Jail* v. *Jackson*, 416 F. Supp. at 120; *Ballard & Associates, Inc.* v. *Mangum*, 368 A.2d 548, 550 (D.C. App. 1977). The District of Columbia vigorously defended its interests in the previous case before Judge Penn, and did not submit itself to an adverse judgment because of the insignificance of the claim. *See* 1B J. Moore, *Moore's Federal Practice* ¶ 0.412, at 1805-12 (1974 & Supp. 1978). Therefore, the plaintiffs in this action may apply the collateral estoppel doctrine against the defendants even though the plaintiffs here were not parties to the litigation in Superior Court.

The plaintiffs may also benefit from the application of the collateral estoppel doctrine against the United States, for two reasons. First, and most importantly, the United States participated extensively in the proceedings before Judge Penn. It is sufficient to quote from Judge Penn's opinion:

> Although the United States is not a formal party in this case it has actively participated in and been fully represented at every hearing. An attorney for the United States, and sometimes more than one, attended all proceedings in this case. Even though the arguments and briefs were written and filed in the names of the defendants, counsel for the United States argued on given points of law. This then is not the case where the United States merely reviewed pleadings and observed the proceedings in the courtroom; this is the case where the United States was a very active participant, participating in the writing of pleadings and briefs and at oral argument. Indeed, on one occasion these defendants asked for additional time to file a responsive pleading to the plaintiffs' motions for summary judgment for the reason that "counsel for the defendant was advised by a

> representative of the Department of Justice that a short additional extension of time was needed in order for *them* to prepare and make copies of the pleading responsive to plaintiffs' motion." (Emphasis in opinion) There is no doubt that the argument presented to this Court in these cases is the argument of the United States.

Chesapeake and Potomac Telephone Co. v. *District of Columbia*, CA No. 2671-75, at 21-22 (March 28, 1978). The second factor in favor of applying the collateral estoppel doctrine against the United States is that the government, in its motion for summary judgment, has not raised a single fact that would indicate that, on the merits, it is indeed the owner of the original alleys of the District of Columbia. This is the case even though the United States participated in the Superior Court litigation, and even though this court gave the United States substantial time to review the records in the Archives.

C. *Other Claims in Defense.*

The defendants nonetheless make a number of arguments why the bar of collateral estoppel should not be applied to them. First, the District argues that "in judicial review of administrative proceedings the Court cannot or will not consider *legal* contentions not made before the Commissioners, or, as in this case, in the complaint seeking judicial review" (emphasis added). The question of ownership of the alleys, however, is a question of *fact*, and it properly was considered and resolved by Judge Penn. Second, the District contends that D.C. Code § 7-302 (1973) requires payment for the closing of "original alleys" without any reference to title in the United States, and that the Commissioner could have closed under that statute.[4] Section 7-302 states, in pertinent part, that:

[4] The alley involved in this case was closed pursuant to D.C. Code § 7-401 (1973).

> If the alley to be closed is an original alley, [they] may sell the land contained therein for cash at a price not less than the assessed value of contiguous lots. If the alley is not an original alley, the title thereto shall revert to the owners of the land abutting thereon . . . .

In essence, the District argues that pursuant to this provision the Mayor and the Council of the District of Columbia are vested with the authority to sell land that is privately owned and not the property of the District of Columbia or the United States. It is difficult to imagine how such a result could be justified on a proper interpretation of the statute. Section 7-302 is merely a perpetuation of the erroneous presumption that title to the original alleys is in the United States. *Washington Medical Center* v. *United States*, 545 F.2d 116, 134-35 (Ct.Cl. 1976) is an example of the same error. As Judge Penn concluded:

> Although some past court opinions have suggested that title to the alley was in the United States, those opinions were rendered at a time when the original documents were not before the court or the court did not have an opportunity to consider those documents.

Chesapeake & Potomac Telephone Co., supra, at 46-47.

Finally, the United States, in an eleventh-hour attempt to avoid the clear import of Judge Penn's decision, raises the claim that this case is in reality a quiet title action pursuant to 28 U.S.C. § 2409a (1976), which must be brought only in a U.S. District Court, *see* 28 U.S.C. § 1346(f), within twelve years of the date of the accrual of a cause of action. *See* 28 U.S.C. § 2049a(f). These provisions might be controlling if this were indeed a quiet title action; however, the court cannot conclude that it is an action to quiet title. This litigation began with a 1973 challenge to the authority of the District of Columbia to

charge fair market value for the alley space closed. After the Court of Appeals upheld this court's determination that the District did have such power, the factual question arose as to ownership by the United States. This action was filed, against the District of Columbia, in April of 1977, to resolve the factual question remaining from the prior litigation. In September, 1978, the United States filed a motion for intervention as a party defendant, and having intervened, asserted that this action should have been brought from the outset as an action to quiet title, merely because a factual question of ownership is involved. The court cannot agree.

The plaintiffs presently have title to the land. Their title has been recorded, and a rather substantial building constructed. They are not asserting that the United States presently threatened their title to the land. The question of whether the United States once owned the land is merely incidental to the question of the District of Columbia's ability to collect the fair market value of the alley closed.

Summary judgment will be entered for the plaintiff. An appropriate Judgment follows.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX E

IN THE UNITED STATES COURT OF CLAIMS
(Decided October 20, 1976)

No. 359-72

WASHINGTON MEDICAL CENTER, INC., ET AL.,

v.

THE UNITED STATES

No. 333-73

1776 K STREET ASSOCIATES

v.

THE UNITED STATES

No. 156-75

METROPOLITAN CLUB OF THE CITY OF WASHINGTON

v.

THE UNITED STATES

No. 246-75

D. F. ANTONELLI, JR.

v.

THE UNITED STATES

No. 247-75

JACK KOGOK

v.

THE UNITED STATES

Lawrence A. Miller, attorney of record for plaintiff in No. 333-73.

Whayne S. Quin, attorney of record for plaintiffs in cases numbered 359-72, 156-75, 246-75 and 247-75. *Wilkes & Artis* and *Glenn D. Simpson*, of counsel.

Thomas L. McKevitt, with whom was *Assistant Attorney General Peter R. Taft.*

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and SKELTON, *Judge*.

ON DEFENDANT'S MOTION AND CROSS-MOTIONS FOR SUMMARY JUDGMENT AND PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

In these five consolidated cases four of the plaintiffs sue the United States to recover money paid by them to the United States for the closing of certain portions of various original alleys in the city of Washington, D.C., and the remaining plaintiff sues the Government to recover the amount paid by him to the United States for the closing of a portion of an original street in said city, namely, G Street, N.W.[1] The defendant contends that the charges made for the closing of the portions of the alleys and G Street were proper and in accordance with laws enacted by the Congress, and that the plaintiffs should be denied any recovery. The case is before us on cross-motions for summary judgment.

After carefully considering the pleadings, evidence, briefs, and the argument of counsel, we conclude that

[1] "Original alleys" and "original streets" are those alleys and streets that were laid out and provided for in the original Federal City of Washington in the District of Columbia.

the plaintiffs are not entitled to recover and we hold for the defendant.

The facts involved in these cases are generally as follows. The plaintiff, Washington Medical Center, Inc., joined by William J. Cusack and Frances S. Cusack and Mary C. Morgan, 1776 K Street Associates, the Metropolitan Club of the City of Washington, and D. F. Antonelli, Jr., were the owners of various lots abutting certain portions of original alleys in the original squares listed below.[2] None of these plaintiffs owned all of the lots in an entire square. The plaintiff Jack Kogok owned certain lots abutting on a portion of G Street, N.W. All of the plaintiffs desired to have the portions of the alleys and street (in the case of Kogok) closed so that they could erect buildings or other improvements thereon. Accordingly, they filed applications with the City Council (formerly the City Commission) of Washington, D.C., the duly authorized agent of the United States, to close the portions of the alleys and street on which their lots abutted. The council acted favorably on the applications of the plaintiffs provided that the plaintiffs would pay "a price not less than the assessed value of contiguous lots." The plaintiffs agreed to such payments and the council determined and found that the proper payments to be made by the plaintiffs, respectively, for the closing of the portions of the alleys in the squares and street listed below were as follows:

Plaintiff	Squares	Fair market value
(a) Washington Medical Center	107	$247,701.60
(b) 1776 K Street Associates	126	74,769.05
(c) Metropolitan Club	166	63,725.40
(d) D. F. Antonelli, Jr.	252	30,766.00
(e) Jack Kogok	G Street, N.W.	34,700.00

[2] When the city of Washington, D.C. was laid out and platted, the equivalent of modern day city "blocks" were called "squares." They are still referred to in that manner in the decided cases and laws and will be referred to as such in this opinion.

The plaintiffs represented to the council that they were willing to pay the above amounts, respectively, if the council would close said portions of the street and alleys, and, in reliance on such representations, the council made such closings. The plaintiffs voluntarily, and without protest, paid the above amounts found by the council to be due by them, respectively, and in fact were eager to do so. Title to the closed portions of the street and alleys was vested by the council in the respective plaintiffs upon their closings and thereafter the plaintiffs erected buildings or other improvements thereon. At all times the plaintiffs and the council conducted these transactions on the theory that the United States had fee simple title to these original alleys and to original G Street, N.W. The money paid by the plaintiffs was deposited in the United States Treasury to the credit of the United States.

Within three years after the street and alleys had been closed, all of the plaintiffs filed suits in the District Court of the District of Columbia for a refund of the payments they had made for such closings. The suits were against the District of Columbia and the United States. In those suits the plaintiffs relied on the decision of the district court in the case of *Carr* v. *District of Columbia*, 312 F. Supp. 283 (D.D.C. 1970) which held that the District of Columbia could not charge abutting property owners for the closing of a non-original alley under the Street Readjustment Act of 1932, D.C. Code § 7-401, and that it could not charge them for the depreciated value to nearby property caused by the closings. The D.C. Court of Appeals affirmed without an opinion.

In the district court suits for refunds, the plaintiffs included claims for portions of the closed alleys that were not a part of the original alleys involved here, but were common law dedicated portions of the closed alleys owned by the District of Columbia for which the council charged

them. They also asked for refunds for the amounts (not involved here) for the alleged depreciated value of nearby property caused by the closings. Included in those suits were also the identical claims involved here for refunds of the amounts paid to the United States for the closing of the described portions of the *original* alleys and original G Street, N.W. On January 8, 1974, the district court entered orders in those cases (Civil Actions Nos. 1906-72, 2514-72, 1905-72, 660-72, 1093-71 and 2015-70) holding that the District of Columbia could not charge abutting property owners the fair market value of alleys *owned* and closed by the District of Columbia unless an objection to the closing has been made, nor charge for the depreciated value of nearby property caused by the closing, "notwithstanding the fact that a portion of the land in Square * * * was original U.S. property." The court entered judgment for the plaintiffs on such claims, but dismissed the United States from the suits because of lack of jurisdiction. In the course of the appeal the plaintiffs raised for the first time the proposition that the United States did not have title to the original alleys and the original street that were closed and by reason of that fact could not charge the plaintiffs for the closings. On June 20, 1975, the D.C. Circuit Court of Appeals affirmed in cause No. 73-2053 the judgment of the district court without opinion and without passing on the title question. Thereafter, the plaintiffs filed the present suit.

Plaintiffs in this action challenge the authority of the District of Columbia to impose a fair market value charge on the basis that (1) the United States had no title to the original street and original alleys that were closed, (2) the District of Columbia has no statutory authority to make such charges under either § 7-401, *et seq.* or § 7-303, (3) the land areas closed had only nominal value, and (4) the charges were in violation of the District

of Columbia Administrative Procedure Act and due process of law.

The defendant says that (1) the plaintiffs are estopped by their prior actions from claiming the refunds, and (2) in any event the United States had fee simple title to the original street and the original alleys, and the District of Columbia was fully authorized by Acts of Congress to make the charges for closing the street and alleys involved here.

There is much support for defendant's estoppel argument and it may be that these cases could be disposed of on that basis. The closing of the street and alleys was a discretionary act on the part of the council. The plaintiffs had no constitutional right to have the street and alleys closed. Under these circumstances, the plaintiffs themselves affirmatively initiated the closing procedures by filing their closing applications with the council. They represented to the council that they were willing to pay the charges fixed by the council if the street and alleys were closed, and they intended for the council to rely on these representations. The council did rely on them and closed the street and alleys to the detriment of the city and the United States in that the closed portions of the street and alleys could no longer be used for travel or traffic, garbage pickup, access by police, ventilation, passage of fire trucks, and the installation of utility lines such as gas, telephone, water, sewer, and electric light and power. The plaintiffs voluntarily and willingly paid the charges for the closings without any protest whatsoever as to title or as to the procedure followed by the council in closing the street and alleys. The title to the closed portions of the street and alleys was vested in the plaintiffs by the council and the property was delivered to them. Thereafter the plaintiffs erected buildings and other improvements on the property and have enjoyed the possession and use of the property

since the dates of the closings and they or their successors in title will continue to use and enjoy the same for all time to come. From these facts, it appears that most if not all of the elements of estoppel against the plaintiffs and their claims are present in this case. The plaintiffs say that estoppel cannot be used against them, citing the case of *1776 K Street Associates* v. *District of Columbia*, No. 73-2053 by the D.C. Circuit Court of Appeals. In that case the D.C. District Court held that estoppel would not apply against the plaintiffs who were suing for a refund of money paid by them to the District of Columbia for the closing of a *non-original* alley *owned by the District of Columbia*, because the District of Columbia Council had no authority to make such charges for the closing of an alley of this type owned by the District of Columbia, citing *Carr* v. *District of Columbia*, 312 F. Supp. 283 (D.D.C. 1970), aff'd mem., No. 24,406 (D.C. Cir. Sept. 28, 1971) another *non-original* alley closing case. The holding on estoppel in the above *1776 K Street Associates* case is clearly inapposite in the present case because the decision there was based on the lack of authority of the District of Columbia Council to charge for the closing of a non-original alley owned by the District of Columbia, whereas, in the instant case we are dealing with an *original* street and *original* alleys which the defendant contends are owned in fee simple by the United States and which Congress has authorized to be closed and charges collected therefore by the District of Columbia Council as its agent. There is no lack of authority of the council to make the charges in this case.

Although, as pointed out above, it may be that we could dispose of these cases against the plaintiffs on the doctrine of estoppel, we have decided not to do so. We have concluded that the crucial and controlling question is the title issue, and that it should be decided not only for the purpose of disposing of the present cases, but also

as a precedent for the solution of other like claims we understand are pending, and others that will no doubt arise in the future. A decision of the title issue is vital, because if the United States owned the street and alleys in fee simple at the time of the closings, Congress had the power to authorize the District of Columbia Council to charge for their sale (closings, and vesting of title in plaintiffs), because they were Government property. On the other hand, if the United States did not have title in fee simple to the street and alleys at the time they were closed, Congress would not have the power to authorize the council to charge for their closing, as the Government cannot sell property it does not own. In the latter case, the charges would be unauthorized and the plaintiffs would be entitled to refunds of the money paid if the plaintiffs themselves had title to the property.

In order to decide the title question, it is necessary to go back in history to the time of the founding of the Federal City of Washington.

The interesting history of the founding of the city of Washington, is set out in much detail in *Morris* v. *United States*, 174 U.S. 196, 245-259 (1898) (maps at 220-221), in somewhat more abbreviated form in *Van Ness* v. *City of Washington*, 29 U.S. (4 Pet.) 232 (1830), and, in shorter form in *Fitzhugh* v. *United States*, 40 F. 2d 797, 798-799 (D.C. Cir. 1930). The high points of that history are as follows:

Under the Charter of June 20, 1632, from Charles I, King of England, Cecilius Calvert, the first Lord Proprietary of the Province of Maryland, was granted all lands now embraced within the District of Columbia. After the American Revolution, Maryland became a state and succeeded to all rights of the Lord Proprietary, including the absolute right to the soil for use by the people of the new sovereignty.

The State of Maryland authorized cessation to the United States of the territory which is now the District of Columbia. (Act of December 23, 1788, Maryland Laws 1788, Chapter 46, D.C. Code p. XXX (1973)). By Act of Congress, adopted July 16, 1790 (1 Stat. 130 Ch. 28; D.C. Code p. XXXIII), as amended by Act of Congress approved March 3, 1791 (1 Stat. 214, Ch. 17; D.C. Code p. XXXIV), the cession was accepted and the President of the United States was authorized to appoint three commissioners whose duty was to "survey, and by proper metes and bounds define and limit" such district or territory.[3] The Act empowered the commissioners "to purchase or accept such quantity of land on the eastern side of * * * [the Potomac River] for the use of the United States, and according to such plans as the President shall approve." Additionally the commissioners were required to provide suitable buildings for the accommodation of public offices prior to the first Monday in December 1800, at which time the seat of government would be transferred to the Federal City.

On January 24 and March 30, 1791, the President by proclamation located and defined the limits of the District of Columbia and appointed the commissioners who, with their successors, located and laid out the city of Washington. (D.C. Code, p. XXXIV and XXXV (1973)). The general boundaries of the proposed city now called the "original" city were the Eastern Branch, the Potomac River, Rock Creek to a point near P Street, N.W., then following what is now Florida Avenue to 15th and H Streets, N.E., then south to C Street, N.E., then east to 20th Street and then south to the Eastern Branch. The land within was devoted mostly to farm purposes owned principally by 19 owners hereinafter sometimes referred to as "original proprietors."

---

[3] On January 22, 1791, President Washington appointed Thomas Johnson, Daniel Carroll and David Stuart as such commissioners. *See Morris* v. *United States, supra* at 250.

While various maps and plans for the city were being prepared under the direction of the President and the commissioners, negotiations were being entered into between the commissioners and the original proprietors which resulted in agreements executed by the parties providing for the disposition of the land within the original city pursuant to deeds of trust to be executed. The agreements, signed March 13, 1791, provided as follows:

> "We, the subscribers, in consideration of the great benefits we expect to derive from having the Federal City laid off upon our lands, do hereby agree and bind ourselves, our heirs, executors and administrators, to convey in trust to the President of the United States, or Commissioners, or such person or persons as he shall appoint, *by good and sufficient deeds in fee simple, the whole of our respective lands* which he may think proper to include within the lines of the Federal City, for the purposes and on the conditions following:
>
> "*The President shall have the sole power of directing the Federal City to be laid off in what manner he pleases. He may retain any number of squares* he may think proper for public improvements, *or other public uses*, and *the lots only* which shall be lai l off *shall be a joint property between the trustees on behalf of the public and each present proprietor*, and the same shall be fairly and equally divided between the public and the individuals, as soon as may be after the city shall be laid out.
>
> "*For the streets the proprietors shall receive no compensation, but for the squares or lands in any form which shall be taken for* public buildings or any kind of public improvement *or uses*, the proprietors, whose lands shall be so taken, shall receive at the rate of twenty-five pounds per acre, to be paid by

> the public," etc. [Emphasis supplied.] ([*Morris* v. *United States, supra*, at 247-48, and *Van Ness* v. *City of Washington, supra*, at 276.]

On June 29, 1917, the proprietors executed deeds, all of which were identical, to Thomas Beall and John M. Gantt, trustees, who had been designated by the President, to consummate the agreement of the preceding March with the commissioners. All of the deeds conveyed all of the lands of the proprietors within the bounds of the city in fee simple upon the following trusts:

> * * * "*That all the said lands, &c.*, as may be thought necessary or proper to be laid out, together with other lands within the said limits, for a federal city, *with such streets*, squares, *parcels* and lots as the president of the United States, for the time being, shall approve; and that the said (the trustees), &c., shall convey to the commissioners for the time being, appointed by virtue of the act of congress, entitled, &c., and their successors, *for the use of the United States for ever, all the said streets, and such of the said squares*, parcels and lots, *as the president shall deem proper, for the use of the United States;* and that as to the residue of the said lots into which the lands, &c., shall be divided, a fair and equal division of them shall be made, and if no other mode of division shall be agreed on, by consent of the said (grantor), &c., and *all the said lots* which may in any manner be divided or assigned to the said (grantor) shall thereupon, &c., be conveyed by the said (trustees) to the said (grantor), his heirs and assigns; and that the *said other lots* shall and may be sold at such time, &c., as the president of the United States for the time being shall direct; and that the *said (trustees)*, &c., will, on the order and direction of the president, *convey all the lots so sold,*

and ordered to be conveyed, to the respective purchasers *in fee-simple*, &c." * * * [Emphasis supplied.] [*Van Ness* v. *City of Washington, supra*, at 283.]

The Supreme Court in the *Van Ness* case then pointed out:

> * * * Provision is then made that the twenty-five pounds per acre, *to be paid by the United States for the squares, should be paid out of the proceeds of such sales, and the residue shall be paid to the president, as a grant of money to be applied for the purposes, and according to the act of congress. Provision is also made for other objects, not material to be mentioned, and for a conveyance of the trust property to such other persons as the president might thereafter direct, *in fee*, "subject to the trusts then remaining to be executed, and to the end that the same may be perfected." In pursuance of this last provision, Beall and Gantt, the trustees, made a conveyance of the premises, by an indenture, dated the 30th of November 1796, to certain commissioners appointed under the act of Congress, subject to the trusts then remaining to be executed; and, among other things, conveyed to the commissioners all that part of the lands, &c., which had been laid off into squares, parcels or lots for buildings, and now remaining so laid off, in the city of Washington. [Emphasis supplied.] [*Van Ness* v. *City of Washington, supra*, at 283-84.]

In the *Van Ness* case, only the streets and public squares in Washington, D.C. were involved. The heirs of one of the original proprietors contended in the suit that under the above trust agreement the streets and public reservations had to remain such and if changed or sold by the Government, the title thereto would revert to the heirs of the original proprietors who were the plaintiffs

in that case. The Supreme Court held that the United States acquired a fee simple title to the streets and public squares under the above deeds of trust from the original proprietors. The Court said:

> Now, upon such legal import, there do not seem grounds for any reasonable doubt. The streets and public squares are declared to be conveyed "for the use of the United States for ever." *These are the very words, which by law are required to vest an absolute unconditional fee-simple in the United States.* They are the appropriate terms of art, if we may so say, to express an unlimited use in the government. If the government were to purchase a lot of land, for any general purpose, they are the very words which the conveyance would adopt, in order to grant an unlimited fee to the use of the government. There are no other words or references in the instrument, which control in any manner the natural meaning of them. There are no objects avowed on the face of it, which imply any limitation. How then can the court defeat the legal meaning and resort to a conjectual intent?
>
> * * * But it is sufficient for us, that here there is a solemn conveyance, *which purports to grant an unlimited fee in the streets and squares, to the use of the United States*; * * *
>
> * * * *If the United States possess, as we think they do, an unqualified fee in the streets and squares*, that defeats the title of the plaintiffs, and definitely disposes of the merits of the cause. [Emphasis supplied.] [*Van Ness* v. *City of Washington, supra* at 285-86.]

Of course, the title to the original alleys was not involved in that case, but we think the same reasoning should be applied to such alleys because they were in-

cluded in the squares. The trust agreement conveyed *all* the lands of the proprietors in the city to the United States in *fee simple*. It is to be noted that the deeds conveyed such lands "for the use of the United States forever all the said streets, and *such of the said squares, parcels and lots, as the president shall deem proper, for the use of the United States.*" [Emphasis supplied.] As shall be shown below, President Washington, by a proclamation and regulations, reserved the property in the alleys for the use of the public (United States).

As for the original streets, the Supreme Court held in yet another case, namely, *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U.S. 672 (1884), that the United States held fee simple title to all of the streets in the original city of Washington. The Court quoted with approval the above holding in the *Van Ness* case and stated:

> It was accordingly decided in that case that *the ownership of the land over which the streets* in the city of Washington *had been laid out on the original plan was vested by the deeds of the proprietors in the United States* so completely and unconditionally that Congress might lawfully dispose of it to private persons, or otherwise convert it to any use whatever. [Emphasis supplied.] [*Id.* at 681.]

The Court stated further:

> Notley Young [one of the proprietors] and the successor to his title had no property in the street, not even the right to insist that it should be maintained as such. *The United States held its title to the land over which it was laid out*, for its own use, and not in trust for any person or for any purpose. Emphasis supplied.] [*Id.* at 684.]

From these decisions and the agreement with the proprietors and their conveyances to the trustees, we hold

that the fee simple title to the *original streets* was and is vested in the United States.[4]

As to the *original alleys*, we wish to emphasize that in the agreement with the proprietors it was provided:

> *The president shall have the sole power* of directing the federal city to be laid off in what manner he pleases. *He may retain* any number of squares * * * for public improvements or *other public uses*; and the *lots only* * * * shall be the joint property between * * * the public and each * * * proprietor and the same shall be * * * equally divided * * * for the *squares or lands*, in any form, which shall be taken for * * * *any kind of public improvements or uses*, the proprietors * * * shall receive * * * twenty-five pounds per acre to be paid by the public. [Emphasis supplied.]

The conveyances from the proprietors contained the following pertinent provisions:

> *The president shall have the sole power* of directing the federal city to be laid off in what manner he pleases. *He may retain any number of squares * * * for public improvements or other public uses,* and the *lots only* * * * shall be a joint property between * * * the public and each * * * proprietor and the same shall be * * * equally divided * * *.
>
> * * * [F]or the squares *or lands in any form* which shall be taken for * * * *any kind of public*

[4] On December 19, 1791, the State of Maryland ratified the previous Act of Cession (Maryland Law 1791, Ch. 45; D.C. Code p. XXX) noting that agreements had been entered into between the commissioners and the original proprietors by the Deeds of Trust previously described and included in the ratification a specific proviso stating "That nothing herein contained shall be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States * * *."

improvements or uses, the proprietors * * * shall receive * * * twenty-five pounds per acre to be paid by the public. [Emphasis supplied.]

We interpret these instruments as giving President Washington full power and authority to vest a fee simple title in the original alleys in the United States. He did so by issuing in his own handwriting the following regulations on October 17, 1791:

> *The way into the square*, being designed in a special manner, for the common use and convenience of the occupiers of the respective squares, *the property in the same is reserved to the public*, so that there may be an immediate interference on any abuse of the use thereof by any individual to the nuisance or obstruction of others. The proprietors of the lots adjoining the entrance into the squares, an arching over the entrance and fixing gates in the manner the Commissioners shall approve shall be entitled to divide the space over the arching and build it up with the range of that line of the squares.
>
> * * * * *
>
> These regulations are the terms and conditions under and upon which conveyances are to be made according to the deeds in Trust of the lands within the City.
>
> Signed G. Washington [5]

The controlling words in these regulations as far as the title to the alleys is concerned are:

> The way into the square * * * the property in the same is reserved to the public * * * [6]

---

[5] On file in the National Archives in Washington, D.C.

[6] An original alley in the city of Washington, D.C. was called a "way into the square." In later years Congress referred to it as an alley and we will use the term "alley" in this opinion.

The word "property" is defined in Webster's Seventh New Collegiate Dictionary, 1965 as follows:

> Ownership, something to which a person has legal title.

It is defined in The Living Webster Encyclopedic Dictionary of the English Language, 1971 as follows:

> That which one owns * * * goods or lands owned * * * ownership or right of possession, enjoyment, or disposal of anything, especially of something tangible * * *.

"Property" is defined in Black's Law Dictionary 1382 (4th ed. (Rev.) 1968) as follows:

> * * * [T]hat which belongs exclusively to one: * * *. The term is said to extend to every species of valuable right and interest. * * * More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. The exclusive right of possessing, enjoying, and disposing of a thing. * * * The highest right a man can have to anything; * * *.

See also 73 C.J.S. *Property* § 1 (1951), where "property" is defined as follows:

> The word "property" means ownership, and it also means the right of ownership. In one sense "property" signfies the sum of all the rights and powers which are incident to ownership, and it means every right which accompanies ownership and is its incident, since all rights which pertain to the ownership of property are property. In the narrower sense "property" implies exclusive ownership of things, as where a man owns a piece of land or a horse, and

> thus the thing of which there may be ownership is called "property," as is whatever is exclusively one's own. The term is further defined as meaning that to which a person has a legal title, whether or not in his possession; but property in a thing does not consist merely in its ownership and possession. "Property" is sometimes defined as meaning estate, whether in lands, goods, money or intangible rights; and in the Blackstonian sense "property" means those things which one has the right to hold, possess, and enjoy to the exclusion of any other individual in the universe. [Footnotes omitted.] [*Id.* at 148.]

See also Words and Phrases, Vol. 34-A, *Property*, at 110, 114-15, 118; *Nashville, Chatanooga & St. Louis Ry. Co.* v. *Wallace*, 288 U.S. 249 (1933); and *Texas Co.* v. *Hauptman*, 91 F.2d 449, 451 (9th Cir. 1937).

The word "reserved" has the ordinary meaning of "retained," "kept" or "set apart." The word "public" means the "United States," which is the same meaning given to it in the agreements with the proprietors and as used in their conveyances to the trustees.

Therefore, we conclude that this reservation by President Washington had the same meaning and the same effect as if it had been worded as follows:

> The alley * * * the fee simple title in the same is retained in the United States * * *.

We hold that this reservation, together with the agreements with the proprietors and their conveyances of all their lands in fee simple to the trustees, vested fee simple title to the original alleys in the United States. This holding is supported by the fact that the United States has asserted sovereignty over these alleys, after the cession by Maryland of the land involved, for over 175 years. During this period of time the common reputation of the alleys was that they were owned by the

United States. (See 73 C.J.S. *Property* § 17 (1951), *Id.* at 213, *Common reputation.*) For almost two centuries everyone had recognized and understood that the United States had title in fee simple to the original alleys. The plaintiffs were of that opinion at the time the alleys in the instant case were closed. No one has ever raised the question until the plaintiffs injected it into these cases in what appears to be an afterthought to recover money they willingly paid for property they obtained and are now enjoying. The Congress has always believed that the United States owned the original alleys, as shown by the various laws it has passed relative to their closing and sale.

The plaintiffs claim that the purchasers of the original lots also paid for portions of the alleys and that the title to such portions passed to the purchasers and that plaintiffs succeeded to their title. The only proof by plaintiffs of such payments are copies of plats of the original squares involved with the apportionments made by the commissioners between the United States and the proprietors. In none of the apportionments are the alleys mentioned. At the bottom of the plats are certain unintelligible and illegible figures relating to alleys that plaintiffs say are on file in the Registers of Squares and these are submitted as proof of their claims. These figures have not been proved up in a proper way and have no probative value whatever. The Supreme Court in the *Morris* case disposed of the same kind of evidence as follows:

> An effort is made to distinguish the case of these lots from that of the lots east of Seventeenth street by referring to a book marked "Register of Squares," produced from among the records of the city, and wherein squares 63 and 89 are bounded on the north by Water street and on the south by the Potomac River, and square 129 is bounded on the north by B street and on the south by the Potomac River.

It was the opinion of the court below that there was a lack of evidence to prove that the registers of squares were contemporaneous and original books which it was the duty of the Commissioners to keep, that the entries were not in their handwriting, nor in that of any person whose handwriting is proved, and that they have not the quality of a public record.

We agree with that court in thinking that, in no point of view, on the evidence adduced in this case, can effect be given to these registers of squares as contradicting or overriding the plans of the city adopted by the President, wherein, as we have seen, the squares in question were bounded by streets interposed between them and the channels of the river. [*Morris* v. *United States*, 174 U.S. at 276-77.]

We agree with the decision of the Court in that case on this point and reject this evidence for the same reason.

The plaintiffs argue that the purchasers of the original lots acquired title to portions of the alleys and that they are their successors in title. Neither proposition has been proved. There is no evidence that the original purchasers of the lots received a conveyance of any portion of the alleys, nor is there any proof showing a chain of title to the alleys from such purchasers to the plaintiffs. Plaintiffs' contentions amount to no more than general allegations without proof. The plaintiffs have occupied themselves with attacking the title of the United States in the alleys without proving that the plaintiffs themselves have title. In suits to quiet title and in trespass to try title, there is a well-established rule that a plaintiff can recover only on the strength of his own title and not on the weakness of defendant's title. *See* 87 C.J.S. *Trespass To Try Title* § 17 (1954) at 1131; *Shapleigh* v. *Mier*, 299 U.S. 468 (1937); *Bursey* v. *Lyon*, 30 App. D.C. 597 (1908); and *Kirby Lumber Corp.* v. *Cain*, 255 F.2d 72 (5th Cir. 1958). Many other cases

could be cited. *See also*, 74 C.J.S. *Quieting Title* §§ 17, 76 (1951) at 41-42 and 119 and cases cited in footnote 58 at 41. While the present suits do not fall in either of those categories, the above principle should apply here, because the plaintiffs could not recover in any event unless they have fee simple title to the street and alleys. This they have not proved.

The plaintiffs also contend that when the lots abutting on the street and alleys were sold, the street and alleys passed to the purchasers as appurtenances to the abutting lots. It is well settled that land cannot be appurtenant to land. This principle was well stated by the Supreme Court in *Harris* v. *Elliott*, 35 U.S. (10 Pet.) 25 (1836). In that case the United States bought several lots for a navy yard. The lots were bounded by certain streets. One of the lots was described by metes and bounds (not including the streets), "*with appurtenances.*" The United States fenced in the streets as a part of the navy yard, claiming that they passed to the United States as appurtenances to the abutting lots. The Court held against the Government saying:

> * * * This term, [appurtenance] both in common parlance and in legal acceptation, is used to signify something appertaining to another thing as principal, and which passes as an incident to the principal thing. Lord Coke says (Co. Litt. 121*b*), a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. According to this rule, *land cannot be appurtenant to land.* In the case of *Jackson* v. *Hathaway* (15 Johns, 454), the court say, it is impossible to protect the defendant, on the ground that the adjoining road passed by the deed, as an incident to the lands professedly granted. A mere easement may, without express words, pass as an incident to the principal object of the grant; but it would be

absurd, to allow the fee of one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted by precise and definite boundaries. And in the case of *Leonard* v. *White* (7 Mass. 6), it was decided, that by the grant of a grist-mill, with the appurtenances, the soil of a way, immemorially used for the purpose of access to the mill, did not pass; although it might be considered as a grant of the easement, for the accommodation of the mill. (Cro. Eliz. 704; Cro. Car. 57; 3 Salk 40.) The answer, therefore, to this branch of the question, must be, that *the soil and freehold of the streets did not pass, under and by virtue of the term "appurtenances,"* * * *. [Emphasis supplied.] [*Id.* at 54.]

Another argument of the plaintiffs is that even if the United States had title to the alleys when the commissioners sold all of the abutting lots in a square, the United States gave up or lost its title to the alley. We do not agree. This identical question was decided by the Supreme Court of Texas in *Town of Refugio* v. *Strauch*, 29 S.W.2d 1041 (1930). In that case the town of Refugio received a grant of four leagues of land from Mexico about the year 1834, which was later recognized by the Republic of Texas and thereafter by the State of Texas. The grant was in the form of a square with the town in the center. Lots and streets were laid out. The land in controversy was a street bounded on both sides by 40 acre farm lots. The town sold all these farm lots and the purchasers put a fence around them and the street. The fence was in place for 40 years. Oil and gas was discovered in the area and the street became valuable property. A lawsuit ensued between the town and the purchasers of the abutting lots, each claiming title to the street. The purchasers claimed that their title went to the middle of the street. The court held against them saying:

* * * The rule is recognized in this state that, when a private individual, as the owner of a lot in a town or city, fronting on a street, conveys a lot, it is presumed that the intent of the grantor was to extend the grant to the middle of the street. This presumption arises out of the necessity of the case, as well as by reason of the fact that the owner of the fee to the street had dedicated the street to public use, but had reserved the fee in himself, subject to the acceptance by the public of the street dedicated. *This presumption, however, does not exist under the facts of this case, since the town of Refugio, a municipality, owns the fee in the land, and has owned it at all times since the sovereign parted with the title. In such a case the presumption is that the grantor intended to keep, and the grantee understood that the grantor was keeping, the fee-simple title.* A presumption cannot arise where the facts themselves are of contrary import. 4 R.C.L. p. 80, 87; *Harding* v. *Jordan*, 140 U.S. 371, 397, 398, 11 S.Ct. 838, 35 L.Ed. 428; *Smith* v. *Slocomb*, 9 Gray (Mass.) 36, 69 Am. Dec. 274; *Lembeck* v. *Nye*, 47 Ohio St. 336, 24 N.E. 686, 8 L.R.A. 578, 581, 21 Am. St. Rep. 828; *Perry* v. *Board of Com'rs of Caddo Lefee Dist.*, 132 La. 415, 61 So. 511, 514; note in 30 Am. St. Rep. 853, and in 39 Am. St. Rep. 154.

In Ruling Case Law, p. 80, it is said: "The presumption primarily applies to conveyances by individuals. *If a municipal corporation having title to the fee to a street conveys land as bounded on it, the title of the grantee does not impliedly extend to the middle, but is limited to the line of the street, because the legal intendment in such case is that it is to remain a public highway.*" 191 C.J. p. 204, it is said: "A conveyance by a city of land bounded

by a street of which it is the owner in fee, the title thereto being held in trust for street purposes, does not carry title to the center of the street, there being no presumption as in case of conveyances by individuals that a conveyance of land bounded on a street carries title to the center of the street." In *Graham* v. *Stern*, 168 N.Y. 517, 61 N.E. 891, 893, 85 Am. St. Rep. 694, it is said:

"There is an obvious and a material distinction between the case of a conveyance by an individual of lands bounded upon or by a street and that of a similar conveyance by municipal authorities. The presumption that obtains ordinarily in the one case * * * should be regarded as offset in the other by another presumption,—that the municipality would not part with the ownership and control of a public street once vested in it for the public benefit. * * * It is altogether the sounder proposition * * * that the grant of title to property bounded by or upon a city street, derived from the public authorities, in the absence of any more definite description, carries only to the line of the street." [Emphasis supplied.] [*Id.* at 1045.]

This brings us to the argument of the plaintiffs that the original alleys in Washington were established under the common law by which the title of the owners of the abutting lots extended to the center of the alleys subject to an easement in favor of the United States and that upon their closing the title reverted to the abutting lot owners. This is a correct statement of the common law rule. *See People* v. *City of Chicago*, 152 N.E. 141 (Sup. Ct. 1926) where this principle is stated as follows:

> At common law the dedication of a street or alley passed to the municipality merely an easement. The dedicator still continued to own the fee, subject to the easement. A deed of an abutting lot passed the title to the center of the street or included the entire street, as the case might be, burdened, of course, with the easement. If the street was abandoned or vacated by the municipality the abutting owner continued to hold his title to the center of the street just as he had held it before, but now freed from the easement. * * * [*Id.* at 144.]

We do not agree that the original alleys in this case were dedicated at common law. When Maryland ceded the land to the United States and the proprietors had conveyed the land in fee simple to the trustees, the sovereignty of Maryland over the land ceased and that of the United States attached. The common law no longer controlled or even applied to the establishment of the alleys. The rule announced in the *Town of Refugio* case and the authorities therein cited is the correct one, namely, that where the city has title to the streets and alleys, the title of the owners of the abutting lots extends only to the line of the streets and alleys and not to the center thereof. In the *Van Ness* case, the Supreme Court at 684 distinguished between the laying out of the original streets in Washington and the common law dedication in *Railroad Company* v. *Schurmeir*, 74 U.S. (7 Wall.) 272 (1868). The United States (in the instant cases) continued to own the fee in the street and alleys to the dates of their closings.

The plaintiffs argue that this is inconsistent with the provision of the statute cited below that allows the owner or owners of an *entire square* to replat the square and rearrange the alley. The plaintiffs say this could not be done if the United States owns the fee in the alley. We do not agree. Congress has taken care of this situation by requiring the replatting of the square and the new alley and requiring the new plat to be submitted to and approved by the city council, and thereafter recorded.

Under these circumstances, the original alley is replaced by a new alley with the approval of the United States and "the *proprietary interest of the United States* shall forever cease and determine and the title to the same shall be vested according to the agreement of the owners as shown in the aforesaid plat * * *." (D.C. Code § 7-307). Thereafter the United States is estopped to assert ownership of the original alley in the square. In the cases before us, the plaintiffs are not the owners of entire squares. They own only a few of the lots in the squares. For instance, the plaintiff Metropolitan Club of the City of Washington owns only two lots out of square 166 which originally contained 27 lots.

The case of *Pratt* v. *Law*, 13 U.S. (9 Cranch) 456 (1815) is very much in point here and is dispositive against the plaintiffs' claim of fee simple title to the alleys in the present cases. In that case, plaintiff Law contracted to purchase 2,400,000 square feet in the Federal City of Washington. His vendors attempted to charge him for square footage in alleys in squares in which the entire squares were not conveyed to him. Law refused to pay for the square footage in the alleys and the matter was taken to court. The Supreme Court agreed with Law, saying:

> * * * If this claim of Law's extended to the alleys in those squares of which the whole was conveyed to him, there would be some ground for disputing it. But as it is confined to those squares only in which the right could not be merged, because some one or more of the lots were the property of another, we think the allowance ought to be made; *for Law certainly has not acquired a title in fee simple in those alleys.* [Emphasis supplied.] [*Id.* at 490.]

The plaintiffs in the instant cases are in the same situation that Law was in as far as title to the alleys is concerned, because they own only a few lots in their

respective squares, and in the language of the Supreme Court they "certainly have not acquired a title in fee simple in those alleys."

Mention should be made of the case of *Bursey* v. *Lyon*, 30 App. D.C. 597 (1908). In that case the Supreme Court of the District of Columbia held, with reference to the title of the United States in the streets and alleys in the Federal City of Washington:

> * * * The foundation of the government's *title to so much of the real estate as was ultimately dedicated to streets, alleys,* or public grounds rested upon contract with the individual proprietors. *As to this portion of the ceded territory, title in the soil became vested in fee simple in the United States.* * * * [Emphasis supplied.] [*Id.* at 605.]

The court held further:

> At this point it is proper to consider whether the legal title to the land here in controversy ever passed to the United States. *The streets, alleys,* and lands selected by the President for public purposes, for which the grantors were to be paid at the rate of twenty-five pounds per acre, by the terms of the deeds of trust and the agreement *became vested in the United States in fee simple,* as soon as the same were selected, set apart, and apportioned by the commissioners. As to the lands so embraced, the executory agreement, and the deed of trust made in pursuance thereof, were no longer executory, but became final and complete. * * * [Emphasis supplied.] [*Id.* at 607-08].

We have a clear-cut holding by the court in that case that the title to the streets and alleys vested in fee simple in the United States. We are in total agreement with such decision by that court.

We held in *Calvin-Humphrey Corp.* v. *United States*, 202 Ct. Cl. 519, 480 F.2d 1323 (1973), that the title to an original alley closed in that case was in the United States. Of course, in that case all parties assumed this to be true and no one raised any question as to the title of the United States in the alley. This was in keeping with the understanding and belief of the general public and of the Congress since 1791.

It is significant that the court in *Carr* v. *District of Columbia*, 371 F. Supp. 293 (D.D.C. 1974), *aff'd and remanded for modification* (September 3, 1975, without opinion), 521 F.2d 324 (D.C. Cir. 1975), (a slip opinion was filed August 18, 1976,) in considering the closing of an original alley in Washington, D.C., repeatedly characterized it as property of the United States. For instance, it stated:

> * * * The entire portion of the alley space to be closed was an original alley *owned by the United States.*
>
> * * * * *
>
> * * * [P]laintiffs were ordered to pay to the Treasury of the United States the sum of $196,200.00 representing the fair market value of *the United States property to be closed.* * * * [Emphasis supplied.] [*Id.* at 295.]

In the conclusions of law the court held:

> The District of Columbia City Council and its members are authorized to close *United States alleys* in the District of Columbia * * *.
>
> Any money received by the District of Columbia for the sale of closed alley space *owned by the United States* must be deposited by the District in the United States Treasury * * *.
>
> * * * * *

> * * * Congress has delegated to the District of Columbia complete authority to close *United States alleys.* [Emphasis supplied.] [*Id.* at 296.]
>
> * * * * *
>
> When the District of Columbia pursuant to D.C. Code § 7-401, * * *, determines that a *United States alley* is useless and unnecessary and decides to close it, *title to the alley does not automatically revert to the owners of the property abutting the area to be closed.* * * *
>
> * * * * *
>
> When closing *original United States* property * * * the District of Columbia City Council may, for the account of the United States, charge abutting property owners the fair market value of the space closed. Section 7-401 *distinguishes between United States and District of Columbia land* and gives the City Council express authority to charge for *United States property.* * * * Because this case involves *an original United States alley* * * *. [Emphasis supplied.] [*Id.* at 297.]

The D.C. Circuit Court of Appeals affirmed the findings of fact and conclusions of law in 521 F.2d 324, and in its slip opinion of August 18, 1976. The foregoing cases support our conclusion that the fee simple title in the original street and alleys was vested in the United States at the time of the closings involved in this case.

The Congress in enacting various laws through the years for the closing, straightening, widening, sale, etc. of alleys in the city of Washington, has recognized and carefully preserved the difference between alleys owned in fee simple by the United States and common law alleys dedicated by developers or abutting property owners which are owned by the District of Columbia. This distinction was pointed out by the court in *Carr* v. *District of Columbia*, 371 F. Supp. 293, 297 quoted

above. In describing the alleys owned by the United States in these laws, the Congress sometimes referred to them as "original alleys, the fee of which is in the United States," (the Act of 1892, §§ 1, 3; the Act of 1901, §§ 1608, 1610) and sometimes described them simply as "original alleys," (the Act of 1905, § 1608a, 1608b and D.C. Code §§ 7-302, 7-303). We conclude that these terms are used interchangeably and have the same meaning, and that when Congress referred to or described an alley as an "original alley" in the various laws dealing with the closing and sale of alleys (including the various sections of the present D.C. Code) it was the intent and purpose of Congress to refer to and describe alleys that were originally laid out in the city of Washington in which the fee simple title was vested in the United States. The parties in the instant cases have agreed that the alleys involved here are "original alleys."

The various laws passed by the Congress dealing with the closing, sale, etc., of alleys in the city of Washington, as listed by the plaintiffs, are the following.

By Act of January 12, 1809, 2 Stat. 511, Ch. VIII, Congress authorized the proprietors of squares and lots in the city of Washington to subdivide squares or lots, and alleys, into "building lots pieces or portions for sale and occupancy." Such authorization included the right to relocate "ways, alleys, or passages." The same Act authorized the President of the United States to subdivide squares or lots belonging to the United States, "which may not have been reserved for public purchase," into "lots, pieces or portions for sale and occupancy and alleys for their accommodation." The provisions of this Act of 1809 are contained substantially in the subsequent Act of March 3, 1901, 31 Stat. 1426, Ch. 854 as set forth in Section 1-612, *et seq.* D.C. Code (1973). *See United States ex rel Case* v. *Forsyth*, 5 Mackey 483 (1887). In 1848 (9 Stat. 223, Sec. 3, 30th Congress, 1st Sess. 1, Chapter 42), Congress added a new pro-

vision permitting the corporation of Washington "to cause new alleys to be opened into squares, and to open, change or close those already laid out, upon the application of the owners of more than one-half of the property in such squares * * *." *See Webb's Digest* 1 (1868).

By Act of July 6, 1882 (22 Stat. 151, 47th Cong. 1st Sess. Ch. 271-273), Congress authorized the closing of alleys upon petition of the owners of an entire square or owners of a part of a square bounded on all sides by public streets if those owners offered to the commissioners of the District of Columbia in the petition to dedicate for public use an amount of ground at least equal to the area of the alleyway sought to be closed. This section is essentially the same as the provisions now contained in § 7-306, D.C. Code (1973).

Congress, in 1892 (27 Stat. 255, 52d Cong., Sess. 1, Sec. 1) authorized the commissioners to:

> * * * [C]ondemn, open, extend, widen or straighten alleys in the District of Columbia * * * [upon] petition of the owners of more than one-half of the real estate in the square * * * or when the Commissioners * * * shall certify that the preservation of peace, good order and public morals require that any such alley should be opened, extended, widened or straightened; or when the health officer of the District shall certify that the opening, extension, widening or straightening of an alley is necessary for public health * * *.

The first portion of Section 1 of the Act of July 22, 1892, is essentially the same as the provision now contained in § 7-301 dealing with the condemnation for alleys and minor streets. Under the second portion of Section 1 and companion Section 3 of that Act (which is essentially the same as § 7-302 D.C. Code (1973)), Congress provided that, if in the opening, extension,

widening or straightening of an alley by condemnation as provided in Section 1 of the Act, the commissioners had authority to close any "*original alley*" or part of such alley rendered,

> * * * [U]seless or unnecessary, the fee to which is in the United States, by entering into an agreement with the owners of the lots or parts of lots contiguous thereto for the purchase by them of the land contained in said alley sought to be closed, at a price to be agreed upon * * * which price shall not be less per square foot than the assessed value per square foot of the contiguous lots * * *.

Also in Section 3, Congress provided that the commissioners could sell and convey such land, *the fee to which is in the United States*, in the alley to be closed for cash to any person or persons. The commissioners were also authorized, in connection with the condemnation for alleys, "to close an alley, or part of an alley, *the fee to which is not in the United States*," upon petition of the owners of all lots or parts of the lots abutting thereon. Section 9 of the Act provided that, "If any monies from the sale of land in which the United States is interested shall remain after carrying out the provisions of the Act, the money shall be paid into the Treasury of the United States by the Commissioners of the District of Columbia."

In 1901, Congress consolidated and added provisions pertaining to the opening, closing and rearrangement of alleys within the District of Columbia. 31 Stat. 1426, 57th Cong. 2d Sess., Ch. 854, March 3, 1901. In §§ 1605 and 1606, Congress reenacted the provisions concerning the closing of alleys whenever all the owners of an entire square or all the owners of part of a square bounded on all sides by public streets petitioned the District of Columbia for closing (see § 7-306 and § 7-307, D.C. Code (1973)). Section 1607 of the same Act provided for the

obliteration of subdivisions and alleys on petition of the owner of an entire square where the owner or owners desire to improve the square by the erection of a building covering not less than two-thirds of the area thereof for the purpose of some business enterprise. This subsection is now embodied in § 7-308, D.C. Code (1973). The first part of Section 1608 is essentially the same as the 1892 Act, except that it also provided for opening, extension, widening and straightening minor streets and provided for the closing of alleys the width of which is less than 10 feet. The second portion of Section 1608 provided for the sale of the alley areas closed in connection with the opening and extension *if the fee title to the land* or part thereof was in the United States. The section with regard to alleys less than 10 feet in width is now contained in § 7-304, D.C. Code (1973). Section 1610 also restates the provisions of the Act of 1892 with regard to closing of alleys *not titled in the United States* rendered useless or unnecessary by the opening, extension, widening or straightening of an alley or minor street as provided in the Act.

By Act of 1905 (58th Cong., Sess. 3, Ch. 734, 33 Stat. 733) Congress again amended the Code of Laws for the District of Columbia and consolidated and added provisions concerning the opening and closing of alleys. These provisions have remained substantially unchanged to date. Sections 1608 and 1608(a) were essentially the same, except that the qualifying words "*the fee of which is in the United States*" *contained in the Act of 1892 and Act of 1901 were omitted after or replaced by the words "original alleys.*" These two companion provisions relating to condemnation for alleys and minor streets now comprise § 7-301 and § 7-302, D.C. Code (1973).

Section 1608(b) relating to closing alleys upon dedication of others, was added for the first time by the Act of 1905. This provision is the same as § 7-303 D.C.

Code. Under Section 1608(b), the commissioners were authorized *for the first time* to accept the *dedication* of an alley or alleys and, in connection therewith, to close any existing alley or alleys in the square in which the dedication is made upon the application of the *owners of all the property abutting upon such existing alley or alleys.* If the alley were an "*original alley,*" the parties were to enter into a mutual agreement in writing under seal as to the disposition of the ownership of the land contained in the alleys. Upon recordation of the required plats, the *original alley* or portions thereof vested in the parties whose names appeared on the plat.

The other provisions of the 1905 Act incorporated previous Acts of Congress. For example, Section 1608(c) incorporated the provisions of the 1901 Act relating to alleys less than 10 feet in width and Section 1608(d) incorporated the provisions of the 1901 Act concerning the closing of alleys in squares owned by one person or partners where there was a desire to construct a building covering not less than two-thirds of the area thereof. Section 1611 (the same as § 7-325, D.C. Code (1973)) provided that "All money derived from the sale of land in which the United States is interested, under the provisions of this Act, shall be paid into the Treasury of the United States by the Commissioners of the District of Columbia to the credit of the United States."

On December 15, 1932, Congress adopted the Street Readjustment Act (47 Stat. 747, Ch. 4 § 1 *et seq*) which provided for the closing of streets, roads, highways or alleys or parts thereof in the District of Columbia, or the sale thereof under § 7-302, when, in the judgment of the commissioners, the street, road, highway or alley or part thereof, is rendered "useless or unnecessary" upon certain conditions. See, § 7-401, *et seq.*, D.C. Code (1973). As indicated in the Street Readjustment Act (§ 7-409), the provisions of the Act *were in addition to*

the laws already in existence which provided for the closing of streets, roads, highways or alleys. It provided in § 7-409 that all existing laws authorizing the closing of streets, roads, highways, or alleys were to remain in full force and effect.

At the times the alleys and the street were closed in these cases, the council was authorized to close them under Sections 7-302, 7-303, 7-304, 7-305, 7-306, 7-308, and 7-309 of Title VII, Chapter 3, *Alleys and Minor Streets,* D.C. Code (1973), and Sections 7-401 through 7-410 of Chapter 4, *Closing Streets, Alleys, or Highways* (The Street Readjustment Act of 1932). The alleys that were closed upon the applications of plaintiffs Washington Medical Center, Inc., and The Metropolitan Club of the City of Washington were closed by resolutions of the council that recited that they were being closed pursuant to Section 7-303, as both plaintiffs were dedicating small areas for new alley spaces in addition to requesting portions of the original alleys to be closed under § 703, D.C. Code, which provides as follows:

> § 7-303. Alleys may be closed on dedication of new ones—Application of property owners—Future ownership of closed alleys—Plats recorded
>
> The said commissioners are authorized to accept the dedication of an alley or alleys and in connection therewith to close any existing alley or alleys in the square or block in which such dedication is made upon the application of the owners of all the property abutting on such existing alley or alleys. *If the alley proposed to be closed is an original alley,* the party or parties making the dedication and the parties applying for the closing of the alley or alleys shall present with such application a mutual agreement in writing and under seal, in duplicate, as to the future ownership of the land contained in the alley or alleys to be closed, together with two plats show-

ing the alley or alleys divided into parcels, with the name of the future owner marked on each parcel, in accordance with such agreement. Copies of the order of the commissioners accepting the dedication and closing the original or subdivisional alley, together with the said agreements and plats in the case of an original alley, shall be forwarded by said commissioners to the surveyor and recorder of deeds of the District of Columbia for record and thereafter the title to the land in such subdivisional alley shall revert to the owners of the land abutting thereon, and the title to the land in the original alley shall vest in the parties whose names appear on said plat in accordance with said agreement. Mar. 3, 1901, ch. 854, § 1608b, as added Feb. 23, 1905, ch. 734, 33 Stat. 733. [Emphasis supplied.]

The plaintiffs argue that Section 7-303 nowhere provides for the charging of money or assessment against the plaintiffs for the closing of the alleys, and therefore, the money exacted from them by the council for such closings was done without authority and was accordingly illegal. They contend further that Section 7-302, which does authorize the collection of money by the council for closing original alleys, cannot be looked to nor relied on to sustain the action of the council, because Section 7-303 does not refer to Section 7-302, and the sections of the Code are separate and mutually exclusive of each other and cannot be considered together. We do not agree. This identical point was decided by us adverse to the plaintiffs' position in our opinion in *Calvin-Humphrey Corp.* v. *United States, supra*, where we held:

> * * * It appears that although the Council only referred to section 303 in its resolution closing the alley and accepting the dedication of the new alley, *it was proceeding at the same time under all the other provisions of the Code which authorized it to collect money for the United States for the closing of an "original" alley, the title to which was in the United States.* That is what was done in this case and the money was paid into the Treasuring of the Government. This appears to be in full conformance and compliance with the provisions of the various sections of the Code mentioned above. [Emphasis supplied.] [202 Ct.Cl. at 524.]

In *Carr* v. *District of Columbia*, 371 F. Supp. 293, 297, *supra*, the court made a similar ruling in construing Section 7-401, saying:

> The options afforded the District of Columbia by Section 7-401 in dealing with United States property *are not mutually exclusive.* [Emphasis supplied.]

Even in the first *Carr* case (*Carr* v. *District of Columbia* 312 F. Supp. 283 (D.D.C. 1970)) relied on heavily by the plaintiffs in this case, although it involves the closing of a non-original alley and is inapposite here on the merits, (as it was in the *Calvin-Humphrey* case), Judge John J. Sirica stated in construing Section 7-401, D.C. Code:

> * * * When *all* of the relevant sections of the statute *are read* together it appears that the intention of Congress in enacting the statute was that * * * [Emphasis supplied.] [*Id.* at 285.]

The fact that the council in the instant cases referred to Section 7-303 did not prevent it from requiring the payment of money for the alley closings under Section 7-302 which provides:

> § 7-302. Useless alleys—Sale of original alleys—Revision of title to owner
>
> If in the opening, extension, widening, or straightening of an alley or minor street, or in the extension or widening of public streets or highways, an alley

or part of an alley may have been, or may hereafter be, in the judgment of the said commissioners rendered useless or unnecessary, said commissioners are authorized to close the same. *If the alley to be closed is an original alley, they may sell the land contained therein for cash at a price not less than the assessed value of contiguous lots.* If the alley is not an original alley, the title thereto shall revert to the owners of the land abutting thereon, but all such land shall be subject to the assessment for benefits hereinafter referred to. Mar. 3, 1901 ch. 854, § 1608a, as added Feb. 23, 1905, ch. 734, 33 Stat. 734. [Emphasis supplied.]

It should be pointed out that Section 7-304 refers to Section 7-302 as follows:

§ 7-304. Closing narrow alleys—Application of property owners—Disposal of land

The commissioners are authorized to close any alley or part of alley the width of which is less than ten feet upon the application in writing of the owners of all the abutting property. *If the title to such closed alley is in the United States, the land shall be sold, as provided in section 7-302*; and if the title is not in the United States, the land shall revert as provided in said section. Mar. 3, 1901, ch. 854, § 1608c, as added Feb. 23, 1905, ch. 734, 33 Stat. 734. [Emphasis supplied.]

Also, Section 7-401 in listing the various options available to the council in disposing of closed original alleys, provides:

* * * [O]r also said property be sold as provided in section 7-302 this title, * * *.

Finally, Section 7-325 provides:

§ 7-325. Proceeds of sale of lands paid into Treasury.

All money derived from the sale of land in which the United States is interested, under the provisions of section 7-301 to 7-308, 7-313 to 7-318, 7-320, 7-321, 7-323, 7-325 to 7-330 shall be paid into the treasury of the United States by the commissioners of the District of Columbia to the credit of the United States.

It is clear from these various sections of the D.C. Code that refer to each other, and especially Section 7-325 above which refers to all of the principal sections involved in these cases, except Section 7-401 (which itself refers to Section 7-302), that Congress intended that all of these sections must be considered together and in the conjunctive and not disjunctive as plaintiffs contend.

Accordingly, we hold that all of the sections of the D.C. Code listed above must be considered together and in conjunction with each other, and that they are not mutually exclusive. The authority and power granted in one section extends to and applies to each of the other sections.

The council closed the street and alleys described in the petitions of the plaintiffs 1776 K Street Associates, D. F. Antonelli, Jr., and Jack Kogok, under Sections 7-401, *et seq.* of the D.C. Code. Section 7-401 is as follows:

§ 7-401. Street Readjustment—Closing of unnecessary public ways authorized—Disposition of property —Reference to Planning Commission.

The Commissioners of the District of Columbia are authorized to close any street, road, highway, or alley, or any part of any street, road, highway, or alley, in the District of Columbia when, in the judgment of said commissioners, such street, road, highway, or alley, or such part of a street, road, highway, or alley, has been rendered useless or unenecs-

sary, the title to the land embraced within the public space so closed to revert to the owners of the abutting property subject to such compensation therefor in money, land or structures as the commissioners of the District of Columbia, in their judgment, may find just and equitable, in view of all the circumstances of the case affecting near-by property of abutters and/or nonabutters: *Provided, That if the title to such land be in the United States the property shall not revert to the owners of the abutting property* but may be disposed of by the said commissioners to the best advantage of the locality and the properties therein and thereby affected, which properties thenceforth shall become assessable on the books of the tax assessor of the District of Columbia in all respects as other private property in the District; *or also said property be sold as provided in section 7-302 this title*, unless the use of such land is requested by some other department, bureau, or commission of the government of the United States for purposes not otherwise inconsistent with the proper development of the District of Columbia: *Provided further*, That the said closing by said commissioners is made expedient or advisable by reason of change in the highway plan or by reason of provision for access or better access to the abutting or nearby property and the convenience of the public by other street, road, highway, or alley facilities, or by reason of the acquisition by the District of Columbia or by the United States of America for school, park, playground, or other public purposes, of all the property abutting on the street, road, highway, or alley, or part of a street, road, highway, or alley, proposed to be closed or for other public reasons: *And provided further*, That the proposed closing of any street, road, highway, or alley, or any parts thereof, as provided for in this chapter shall be referred to the

National Capital Planning Commission for its recommendation. Dec. 15, 1932, ch. 4, § 1, 47 Stat. 747. [Emphasis supplied.]

These three plaintiffs say that the council closed the street and alleys under this section of the Code for "the best advantage of the locality" and argue that it did not have the authority at the same time to collect money for the closings notwithstanding the fact that Section 7-401 specifically states that the property may be "sold as provided in section 7-302," which authorizes the council to require the payment of money when streets or alleys owned by the United States are closed or sold. The plaintiffs contend that these provisions are mutually exclusive. These arguments are without merit. We rejected them in the foregoing paragraphs and we reject them again here. The court's decision in the second *Carr* case (371 F. Supp. 293, 297) ruled against plaintiffs' theory in construing this identical section by holding, as pointed out above, that the options in Section 7-401 are "not mutually exclusive." Our holding in the *Calvin-Humphrey* case is to the same effect. Also, as pointed out above, in the first *Carr* case (312 F. Supp. 283) Judge Sirica, in construing the Street Readjustment Act, of which Section 7-401 is a part, held that all of the relevant sections of the statute should be read together.

These three plaintiffs, along with the other two, urge the proposition that the decision in the first *Carr* case (312 F. Supp. 283) that the council could not charge for closing non-original alleys owned by the District of Columbia should also be applied to the closing of the original street and the original alleys in the instant cases in which the fee simple title is vested in the United States. We rejected this contention in *Calvin-Humphrey* and we reject it again here. The law with respect to the closing of a common law dedicated non-original street or alley is not applicable to the closing original streets and alleys owned by the United States.

All of the plaintiffs say that even if the United States owned the fee in the street and alleys, it only had a nominal value and that the findings of the council of the fair market value of the streets and alleys closed and sold under Section 7-302 were far in excess of nominal value and therefore the collection of the respective sums from the plaintiffs was illegal. The short answer to this argument is that the street and alleys were owned by the United States, who did not have to close or sell them. As Government property, it could be sold for whatever price the Congress authorized. In Section 7-302 the Congress fixed the selling price of original streets and alleys "at a price not less than the assessed value of contiguous lots." The council determined these values in accordance with this directive, the plaintiffs agreed to them and willingly paid the amounts found by the council to be due, and without protest of any kind to the council. It is too late for the plaintiffs to protest these values for the first time in this court. *See United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952); *McClung* v. *Thompson*, 401 F. 2d 253, 257 (8th Cir. 1968); and *California Interstate Telephone Co.* v. *Federal Communications Commission*, 328 F.2d 556, 559 (D.C. Cir. 1964). It is hardly possible that the council erred in determining the assessed value of the contiguous lots, as these values are a matter of public record. But even if there were errors, the plaintiffs should have complained about them to the council at the time the errors were made. We cannot consider errors not brought to the attention of the council. Besides, the plaintiffs have not shown any errors made by the council as to the assessed values of the contiguous lots, or the application thereof to the street and alleys involved here, in any of their pleadings, briefs, or other papers filed in this court.

We reject plaintiffs nominal value theory. To support this theory, they say (1) that the United States only had easements and not title, and (2) the rule as to value in

condemnation cases should be applied here. They cite *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); and *Fitzhugh* v. *United States*, 40 F. 2d 797 (D.C. Cir. 1930), in support of their second argument. These are condemnation cases. We do not agree with either of plaintiffs' propositions. We have already held that the United States had fee simple title to the street and alleys and not mere easements. The rule as to value in condemnation cases does not apply to the sale of original streets and alleys in which the fee simple title is vested in the United States and the Congress has fixed the selling price by statute, which is the situation in the instant cases. Consequently, the cited condemnation cases are inapposite.

The plaintiffs say that prior to 1967 the council did not require the payment of money for the closing of non-original or original alleys in the city of Washington and the sale thereof to abutting property owners, but in that year it started charging for such closings and sales. The plaintiffs complain that this was done without notice to the public and that their due process rights were violated. The plaintiffs are in no position to make such an argument. Each of them had full notice from the council that money was required to be paid for the closings and the amount to be paid. After receiving this notice, each plaintiff agreed to pay the amount required by the council and paid it voluntarily with full notice and knowledge as to the charges being made. Nothing was taken from the plaintiffs in violation of due process, as all of the transactions were completed by agreements of the plaintiffs with the council. Furthermore, no objections were made by plaintiffs to the council as to the lack of public notice at the time the charges were made, and we cannot consider them at this late date.

Finally, the plaintiffs Antonelli and Kogok allege in their petitions that the D.C. Administrative Procedure Act became effective on October 21, 1969, and that Sec-

tion 1-1507, D.C. Code (1973) required the council to compile rules and regulations for the closing of streets and alleys and that this had not been done. No proof was offered of these facts. The petition of plaintiff 1776 K Street Associates does not contain any such allegation, but in its brief it makes the same argument. The closings of the street and alleys for these three plaintiffs were made by the council after the effective date of the D.C. Administrative Procedure Act. None of these plaintiffs show how the failure of the council to compile such rules and regulations, if the council so failed, affected their claims or rights in the instant case. They simply say that the failure of the council to compile such rules and regulations was a violation of the Administrative Procedure Act. Even if the council did violate the Act in this regard, which was not proven, such violation is of no help to these plaintiffs without allegations and proof on their part that such a violation denied them a right to which they were entitled under the law. The record is totally lacking as to any such allegations or proof. Under these circumstances, we regard this contention of these plaintiffs to be irrelevant and immaterial to any issue in their cases. Furthermore, even if the council was required to compile such rules and regulations by the Administrative Procedure Act and failed to so do, such failure could not have the effect of overruling and rendering a statute enacted by Congress unenforceable. Section 7-302 of the Act of Congress described above specifically authorized original streets and alleys to be closed and sold and charges made therefor. The mere failure of the council to compile rules under the Administrative Procedure Act could not change nor supersede this statute. We conclude that this argument of these plaintiffs is without merit.

We hold that the United States had fee simple title to original G Street, N.W., and to the original alleys involved in these cases, portions of which were closed and sold by the D.C. Council as agent of the United States to the respective plaintiffs, and that the council was fully authorized by statutes enacted by Congress to make such closings and sales and to charge and collect the amount of the fair market value thereof, as determined by the council, from the plaintiffs in accordance with the statutes, and that by reasons thereof the plaintiffs are not entitled to recover.

Accordingly, the joint motion for summary judgment of the plaintiffs is denied, the motion and cross-motions for summary judgment of the defendant are granted, and plaintiffs' petitions are dismissed.

IN THE UNITED STATES COURT OF CLAIMS

Nos. 359-72, 333-73, 156-75,

246-75 and 247-75

WASHINGTON MEDICAL CENTER, INC., ET AL.

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and SKELTON, *Judge*.

ORDER

These cases come before the court on plaintiffs' suggestion for rehearing *en banc* and motion for rehearing and reconsideration, filed November 16, 1976, pursuant to Rules 7 and 151. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the six active Judges of the court (Judge Kunzig not participating therein) as to the suggestion for rehearing *en banc* under Rule 7, which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing and reconsideration under Rule 151,

IT IS ORDERED that plaintiffs' said motion for rehearing and reconsideration be and the same is denied.

BY THE COURT

Jan. 7, 1977

/s/ Wilson Cowen
Chief Judge